

2013

## Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Debt Burdens

Amanda Harmon Cooley

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_review](https://opencommons.uconn.edu/law_review)

---

### Recommended Citation

Cooley, Amanda Harmon, "Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Debt Burdens" (2013). *Connecticut Law Review*. 217.

[https://opencommons.uconn.edu/law\\_review/217](https://opencommons.uconn.edu/law_review/217)

# CONNECTICUT LAW REVIEW

---

VOLUME 46

NOVEMBER 2013

NUMBER 1

---

## Article

### Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Debt Burdens

AMANDA HARMON COOLEY

*Student loan debt in the United States is now estimated to exceed one trillion dollars. However, in obtaining financial assistance, many postsecondary students do not contemplate the long-term implications of the legal obligations that they accept as conditions for receipt of student loan funds. This mass failure to realize the requirements attached to signing promissory notes and entering into binding loan contracts has recently led to several rounds of reform by the federal government. Unfortunately, these reforms have done little to stem the tide of rising student loan debt, most of which is not dischargeable in bankruptcy. This Article examines how the student debt crisis showcases the newest front in the battle for access to higher education. It outlines the rapid escalation of university and college costs over the last thirty years and the potential harms that accompany those costs. These harms extend beyond the direct financial impact on students to the civic community and economic growth of the country. To help ameliorate these harms, the statutory provisions of the Higher Education Act and their implementing regulations need amendments regarding the counseling that is attached to the disbursement of student loans for all institutions whose students receive Title IV aid. If adopted, these statutory and regulatory amendments would promote informed access without diminishing the quality of higher education or turning students' investments in their futures into unsustainable burdens.*

## ARTICLE CONTENTS

I. INTRODUCTION .....	121
II. A SHORT HISTORY OF EXPANDING ACCESS TO HIGHER EDUCATION .....	126
III. PRESENT CHALLENGES TO ACCESS: RISING COSTS AND STUDENT LOAN DEBT LEVELS .....	133
IV. REFORMING THE FEDERAL STUDENT LOAN COUNSELING PROCESS TO PROMOTE INFORMED ACCESS AND TO REDUCE STUDENT DEBT BURDENS .....	144
V. CONCLUSION .....	155



# Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Debt Burdens

AMANDA HARMON COOLEY\*

*“When kids do graduate, the most daunting challenge can be the cost of college. . . . Higher education can’t be a luxury—it is an economic imperative that every family in America should be able to afford.”*

—President Barack Obama<sup>1</sup>

## I. INTRODUCTION

Student loan debt now totals more than one trillion dollars.<sup>2</sup> This exceeds both credit card debt and auto loan debt in the United States.<sup>3</sup> However, in obtaining financial assistance, most postsecondary students do not contemplate the legal obligations that they accept as conditions to receiving student loan funds.<sup>4</sup> Instead, many students merely sign their Master Promissory Notes with an electronic click<sup>5</sup> and without reviewing the ten pages of small text that outline all of the attendant legal

---

\* Associate Professor of Law, South Texas College of Law. J.D., The University of North Carolina at Chapel Hill; B.A., The University of North Carolina at Chapel Hill. The author would like to thank South Texas College of Law for its research support and her colleagues at South Texas, as well as the faculty members of the Thurgood Marshall School of Law at Texas Southern University, for their valuable feedback.

<sup>1</sup> President Barack Obama, Remarks by the President in State of the Union Address (Jan. 24, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

<sup>2</sup> Josh Mitchell & Maya Jackson-Randall, *Student-Loan Debt Tops \$1 Trillion*, WALL ST. J., Mar. 22, 2012, at A5.

<sup>3</sup> Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by College Debt*, N.Y. TIMES, May 13, 2012, at A1; Daniel de Vise, *Student Loans Surpass Auto, Credit Card Debt*, WASH. POST (Mar. 6, 2012), [http://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQRfQnuR\\_blog.html](http://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQRfQnuR_blog.html).

<sup>4</sup> See Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 54 (2011) (“[S]tudents may not pay attention to loan terms until they begin repayment years after signing master promissory notes to cover their college costs.”).

<sup>5</sup> See *Master Promissory Note: What to Expect*, STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/whatToExpect.action?page=mpn> (last visited Sept. 15, 2013) (providing that the entire Master Promissory Note process takes approximately thirty minutes to complete and will simply require an electronic signature).

responsibilities.<sup>6</sup> This one-time, thirty-minute process will allow most students the opportunity to borrow additional loans for a ten-year period.<sup>7</sup> Although in most forms of financial lending individuals with meager savings and modest incomes would not be permitted to borrow significant sums of money,<sup>8</sup> this has become a commonplace practice in higher education.<sup>9</sup> Typically, this is the first substantial debt that young people incur.<sup>10</sup> Yet, ironically, these loan agreements take place at a time when most student borrowers have the least financial knowledge and experience.<sup>11</sup>

In an attempt to address the mass failure to appreciate the requirements attached to signing promissory notes and entering into binding loan contracts, the federal government has attempted to reform some of the problems related to student loans and debt burdens.<sup>12</sup> These reforms have included the federal takeover of the federal student loan market by eliminating the use of private commercial banks as intermediaries in the student loan process;<sup>13</sup> the revamping of the Income-Based Repayment Plan;<sup>14</sup> and the creation of the Pay As You Earn Plan.<sup>15</sup> Unfortunately,

---

<sup>6</sup> See, e.g., WILLIAM D. FORD FED. DIRECT LOAN PROGRAM, FEDERAL DIRECT PLUS LOAN APPLICATION (2013), available at <http://www.direct.ed.gov/pubs/plusmpn.pdf> (illustrating the small and complex text that borrowers are required to read).

<sup>7</sup> See *Master Promissory Note: What to Expect*, supra note 5 (stating that a master promissory note can potentially be used to borrow additional loans for up to a ten-year period).

<sup>8</sup> See Tamar Lewin, *Student-Loan Borrowers Average \$26,500 in Debt*, N.Y. TIMES, Oct. 18, 2012, at A22 (noting that, amongst borrowers in the college class of 2011, the average student debt was about \$26,500); Mark Kantrowitz, *Who Graduates College with Six-Figure Student Loan Debt?*, FINAID.ORG 1 (Aug. 1, 2012), <http://www.finaid.org/educators/20120801sixfiguredebt.pdf> (finding that 0.2% of undergraduate students and 6.4% of graduate students graduate with six-figure student loans).

<sup>9</sup> See ALAN MICHAEL COLLINGE, *THE STUDENT LOAN SCAM: THE MOST OPPRESSIVE DEBT IN U.S. HISTORY AND HOW WE CAN FIGHT BACK* 4 (2009) (noting that about two-thirds of all college students acquire student loans).

<sup>10</sup> See Jon Marcus, *Student Loan Debt and Financial Literacy: Lack of Safeguards Driving Student Loan Debt*, HUFFINGTON POST (Oct. 22, 2012), [http://www.huffingtonpost.com/2012/10/22/student-loan-debt-and-fin\\_n\\_2001104.html](http://www.huffingtonpost.com/2012/10/22/student-loan-debt-and-fin_n_2001104.html) (discussing the lack of awareness of the legal obligations attached to student loans due to an absence of past borrowing among students).

<sup>11</sup> See Eboni S. Nelson, *Young Consumer Protection in the "Millennial" Age*, 2011 UTAH L. REV. 369, 377–78 (discussing multiple studies that have examined the general lack of financial experience and knowledge of young consumers).

<sup>12</sup> See, e.g., David M. Herszenhorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. TIMES, Mar. 26, 2010, at A16 (“Ending one of the fiercest lobbying fights in Washington, Congress voted Thursday to force commercial banks out of the federal student loan market, cutting off billions of dollars in profits in a sweeping restructuring of financial-aid programs and redirecting most of the money to new education initiatives.”).

<sup>13</sup> See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2212, 124 Stat. 1029, 1078–81 (codified as amended at 20 U.S.C. § 1087f (2012)) (eliminating the bank-based Federal Family Education Loan program).

<sup>14</sup> See *id.* § 2213, 124 Stat. at 1081 (codified as amended at 20 U.S.C. § 1098e(e)) (amending the Income-Based Repayment Plan to provide a lower threshold for what constitutes a “partial financial hardship” and to provide shorter forgiveness periods for any loans made to a new borrower on or after July 1, 2014).

these reforms have done little to stem the tide of rising student loan debt, which is rarely dischargeable in bankruptcy.<sup>16</sup> Indeed, in order to discharge student loan debt, the debtor must demonstrate a showing of undue hardship,<sup>17</sup> and in some courts, a much more severe standard of a certainty of hopelessness is required.<sup>18</sup>

Given these extreme circumstances and their potential to engender a crisis atmosphere,<sup>19</sup> the current status of student loan debt undeniably showcases the newest front in the battle for access to higher education.<sup>20</sup> As costs to attend institutions continue to rise rapidly,<sup>21</sup> students will find it more difficult to pursue education, resulting in harm to individuals' civic<sup>22</sup>

<sup>15</sup> 34 C.F.R. § 685.209 (2013).

<sup>16</sup> See Terrence L. Michael & Janie M. Phelps, "Judges?—We Don't Need No Stinking Judges!!!": *The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 74 (2005) (discussing how difficult it can be to discharge student loan debts in bankruptcy).

<sup>17</sup> See Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 478–81 (2005) (discussing the strict standard of undue hardship in student loan bankruptcy cases).

<sup>18</sup> See *In re King*, 368 B.R. 358, 368–69 (Bankr. D. Vt. 2007) (discussing the split between bankruptcy courts as to whether a showing of a certainty of hopelessness is required in order to show the undue hardship that is necessary for the discharge of student loans); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 222 (2012) (discussing bankruptcy court decisions that have utilized the certainty of hopelessness standard); see also Richard Fossey, "The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?", 26 J.L. & EDUC. 29, 31 (1997) (arguing that the "undue hardship" clause in the Bankruptcy Code should be interpreted in such a way that overburdened individuals can discharge their debts in bankruptcy without the necessity of showing 'the certainty of hopelessness' in their long-term economic future").

<sup>19</sup> Compare William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 487 (2011) ("The problem [of outstanding United States student loan debt] is reaching a tipping point particularly in the aftermath of the most recent recession, as many students financed expensive educations under the assumption that the post-graduation jobs and average salaries advertised by schools and school ranking magazines would be available to them."), and Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 503 (2000) ("Since enactment of the Guaranteed Student Loan Program in 1965, the looming crisis of America's cumulative student debt has been the subject of significant commentary in the national press."), with Rick Newman, *Maybe All That Student Debt Is a Good Thing*, U.S. NEWS & WORLD REP. (Oct. 1, 2012), <http://www.usnews.com/news/blogs/rick-newman/2012/10/01/maybe-all-that-student-debt-is-a-good-thing> ("But the hand-wringing over excessive student debt might be, well, excessive.").

<sup>20</sup> See Cathleen D. Zick & W. Keith Bryant, *A Review of the Economics of Family Time Use*, 1998 UTAH L. REV. 293, 307 (identifying student loan programs as "public efforts aimed at increasing access to higher education").

<sup>21</sup> See Michelle Jamrisko & Ilan Kolet, *Cost of College Degree in U.S. Soars 12 Fold: Chart of the Day*, BLOOMBERG (Aug. 15, 2012), <http://www.bloomberg.com/news/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day.html> ("[C]ollege tuition and fees have surged 1,120 percent since records began in 1978, four times faster than the increase in the consumer price index. Medical expenses have climbed 601 percent, while the price of food has increased 244 percent over the same period.").

<sup>22</sup> See Richard J. Coley & Andrew Sum, *Fault Lines in Our Democracy: Civic Knowledge, Voting Behavior, and Civic Engagement in the United States*, EDUC. TESTING SERVICES 14 (Apr. 2012), [http://www.ets.org/s/research/19386/rsc/pdf/18719\\_fault\\_lines\\_report.pdf](http://www.ets.org/s/research/19386/rsc/pdf/18719_fault_lines_report.pdf) ("[T]he [voting] rate for high

and economic lives<sup>23</sup> with an impact similar to the effects of not receiving an adequate K–12 education.<sup>24</sup> Further, the student loan problem does not just harm the individual student borrower—the country’s democratic governance,<sup>25</sup> class diversity,<sup>26</sup> economic growth,<sup>27</sup> and public health<sup>28</sup> can be hobbled by a less educated population or a population encumbered by overwhelming educational debt levels. Given these potential harms that accompany the rising costs of postsecondary education and the growing debt loads of students, it has become imperative to implement legal and policy initiatives that promote access to higher education without diminishing its quality or turning students’ investments in their futures into unsustainable burdens.

This Article advocates for one such measure through the next reauthorization of the Higher Education Act.<sup>29</sup> Specifically, it argues for several changes to the statutory provisions of the Act, as well as the related administrative regulation, regarding the counseling that is attached to the disbursement of student loans for all institutions whose students receive Title IV aid.<sup>30</sup> These reforms are necessary given the ineffectiveness of the

---

school dropouts (39 percent) was less than half the rate for those with advanced degrees (83 percent). For individuals who obtained at least some postsecondary education, the rates exceeded two-thirds.”).

<sup>23</sup> See, e.g., Jen Mishory & Rory O’Sullivan, *Denied? The Impact of Student Debt on the Ability to Buy a House*, YOUNG INVINCIBLES 3 (2012), <http://younginvincibles.org/wp-content/uploads/2012/08/Denied-The-Impact-of-Student-Debt-on-the-Ability-to-Buy-a-House-8.14.12.pdf> (“The average single student debtor is likely ineligible for the typical home mortgage due to their debt-to-income ratio.”).

<sup>24</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting) (“[E]ducation [in the context of K–12 education] is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.”); Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 830 (2003) (identifying the high correlation between education and income).

<sup>25</sup> See Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 73 (1997) (identifying individuals with less education as an underrepresented group in democratic participation).

<sup>26</sup> See Benjamin A. Templin, *Social Security Reform: Should the Retirement Age Be Increased?*, 89 OR. L. REV. 1179, 1202–03 (2011) (identifying the less educated as being more at-risk to live at or below the poverty level).

<sup>27</sup> See, e.g., Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN’S L.J. 375, 391 (1996) (linking a lack of education with “continued levels of unemployment”).

<sup>28</sup> See, e.g., Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 684 n.29 (2008) (linking disparities in health care delivery with lack of education).

<sup>29</sup> The next reauthorization of the Higher Education Act will likely occur in the next several years. See Libby A. Nelson, *Higher Ed in the Next Congress*, INSIDE HIGHER ED (Oct. 10, 2012), <http://www.insidehighered.com/news/2012/10/10/higher-ed-congressional-election> (“[M]embers [of Congress] will probably at least begin considering a reauthorization of the Higher Education Act, the massive law that governs federal student aid, although few in Washington expect a full reauthorization in the next two years.”).

<sup>30</sup> See 20 U.S.C. § 1092(b)(1) (2012) (naming the statutory loan counseling provisions under the current version of the Higher Education Act); see also Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (2013) (presenting the current related regulatory provisions on student loan counseling). As

present loan counseling requirements.<sup>31</sup> To remedy this deficiency, this Article calls for a revised statutory and regulatory process that would reflect the complexity and gravity of taking on the substantial legal obligations that are tied to the acquisition of student loan monies. These proposed changes would mandate more robust entrance and exit counseling program requirements; specifically, they would require that each form of counseling be conducted in-person and with personalized information for each student. Further, the proposed amendments would require personalized interim counseling prior to the disbursement of every allocation of student loan funds. Finally, the proposed changes would ensure that institutions of higher education do not impose additional costs on students for these enhanced counseling processes. Altering the statute and regulation in these ways would be a substantial improvement over the extant pro forma systems that meet the current requirements of the Higher Education Act and its implementing regulation.

This call for amendment is a moderate proposal.<sup>32</sup> If adopted, however, it would instill a measure of informed access in the student loan process, unlike other suggested proposals that would limit access to higher education.<sup>33</sup> Also, the changes called for in this Article attempt to address the problems of student loan debt *prior to*, rather than after, the point when these debts are incurred. This type of approach eases the student debt crisis on the front end of student loans acquisitions and has been relatively neglected in academic and policy realms.<sup>34</sup> Finally, this proposal focuses

---

used in this Article, the term “Title IV aid” refers to programs that were originally authorized under the Higher Education Act of 1965 and continue to provide grants, loans, and work-study funds to eligible students. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 79 Stat. 1219, 1232–54 (codified as amended in scattered sections of 20 U.S.C.).

<sup>31</sup> See Deanne Loonin, *Finding a Way Out: Improving the Assistance Network for Financially Distressed Student Loan Borrowers*, STUDENT LOAN BORROWER ASSISTANCE PROJECT 9 (Dec. 2007), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/REPORTDec07.pdf> (“[T]he existing counseling requirements for federal loans are ineffective, simply one of many hoops students jump through to get their student aid checks.”).

<sup>32</sup> See Edward B. Foley, *The Where and When of Voting*, 6 ELECTION L.J. 270, 270 (2007) (reviewing JOHN C. FORTIER, *ABSENTEE AND EARLY VOTING* (2006)) (identifying how “moderate proposals” can be advanced “in an effort to persuade policymakers regardless of their partisan or ideological disposition”).

<sup>33</sup> See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 179–81 (2012) (arguing for a cap on federal student loans for law students on either an individual or institutional basis, but acknowledging the possibility that this could have the effect of limiting access to legal education for non-rich students).

<sup>34</sup> To date, the vast majority of scholarship that has focused on the problems related to student loan debts has advocated for changes to the bankruptcy law regarding the near impossibility to discharge these debts after they have been incurred, for changes related to student loan forgiveness, or for changes to repayment plans. See, e.g., Fossey, *supra* note 18, at 31 (arguing for a relaxation of the draconian standards attached to attempts to discharge student loan debt in bankruptcy); Arthur Ryman, *Contract Obligation: A Discussion of Morality, Bankruptcy, and Student Debt*, 42 DRAKE L. REV. 205, 223 (1993) (urging Congress to “address forgiveness of [student] loans”); Eryk J. Wachnik, *The Student Debt Crisis: The Impact of the Obama Administration’s “Pay As You Earn” Plan on Millions*



on increasing accountability on the part of all of the stakeholders in the student loan process—for the government, the institutions of higher education, and the student borrowers themselves.

Overall, the goal of this argument for statutory and regulatory reform is the provision of informed access to higher education. Consequently, the notion of access serves as the guiding framework for the entirety of this Article. In support of this framework, Part II of the Article provides the historical backdrop for the growth of educational access since the founding of the country, alongside an evaluation of the challenges and barriers to expanding opportunities in higher education. This part of the Article particularly emphasizes the way legislation, supplemented by judicial action and social movements, has often been the primary catalyst in increasing educational access. Part III discusses the present challenges students face in terms of gaining access to higher education given the rapid escalation of university and college costs over the last thirty years and the concomitant rise in student debt loads. Part IV provides a discussion of the current statutory and regulatory provisions for loan counseling. Subsequently, it argues for the enhancement of these legal requirements to advance informed access and to reduce student debt burdens, thereby motivating a potential de-escalation of the costs of postsecondary education. Finally, in Part V, the conclusion addresses the democratic and civic importance of having broad access to higher education for individuals from diverse backgrounds, as such opportunities provide benefits to individual students and the greater social polity. This type of informed access can be achieved through the adoption of the Article's statutory and regulatory reforms, which focus on the prescriptive and preventive side of the student loan debt issue.

## II. A SHORT HISTORY OF EXPANDING ACCESS TO HIGHER EDUCATION

Access to higher education has undergone an expansive transformation since the founding times of the country.<sup>35</sup> The first governmental acts that promoted higher education as a means for opportunity included the Northwest Ordinance,<sup>36</sup> which was enacted by the Confederation Congress in 1787,<sup>37</sup> and the 1862 Morrill Land Grant Act,<sup>38</sup> which allocated federal

---

of *Current & Former Students*, 24 LOY. CONSUMER L. REV. 442, 451–53 (2012) (discussing the problems with the modified Income-Based Repayment Plan for federal student loans).

<sup>35</sup> See JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 346–50 (2004) (discussing the historical expansion of educational opportunities in the United States).

<sup>36</sup> See Northwest Ordinance of 1787, § 14, art. III, The Organic Laws of the United States of America, reprinted in 1 U.S.C. at LIX (Office of the Law Revision Counsel of the House of Representatives ed., 2012) (“Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

<sup>37</sup> See generally Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409 (2013) (providing a history of the Northwest Ordinance); Louis J. Sirico, Jr., *The*

land grants to the states to establish institutions of higher education.<sup>39</sup> These federal legislative acts were supplemented by the states, which extended their support to postsecondary schools through the adoption of constitutional provisions<sup>40</sup> and the chartering of public universities.<sup>41</sup> These early educative efforts, however, focused primarily on the exclusive provision of educational opportunities to affluent, white men.<sup>42</sup>

Access to higher education became a reality for an increasingly diverse group of students from a variety of socioeconomic backgrounds when President Franklin Roosevelt<sup>43</sup> signed the G.I. Bill in 1944.<sup>44</sup> The G.I. Bill

---

*Supreme Court and the Constitutional Convention*, 27 J.L. & POL. 63, 82–83 (2011) (same). Education was also a priority in the First Congress. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 799 (1994) (“The second spending suggestion was Washington’s startling invitation to Congress in his first State of the Union message to ‘promo[te] science and literature’ either ‘by affording aids to seminaries of learning already established’ or ‘by the institution of a national university.’” (quoting 1 ANNALS OF CONG. 934 (1790) (Joseph Gales ed., 1834))).

<sup>38</sup> See 7 U.S.C. § 304 (2012) (providing federal land grants to states for “the endowment, support, and maintenance of at least one college . . . in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life”).

<sup>39</sup> See HAROLD M. HYMAN, *AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL* 36 (1986) (discussing how the Northwest Ordinance and the Morrill Act established the United States as “the first nation in the world . . . to commit its resources for the support of higher education”). States were given a substantial amount of control with respect to how the Morrill Act grants could be used and which types of educational institutions could benefit from them. See William Zumeta, *State Policy and Private Higher Education*, in *THE FINANCE OF HIGHER EDUCATION: THEORY, RESEARCH, POLICY, AND PRACTICE* 355, 374–75 (Michael B. Paulsen & John C. Smart eds., 2001) (discussing the discretion that states received with the land grants, in that the only limitation was the institutional establishment of practical programs, like agriculture, mechanics, and military tactics, in addition to the classical college curriculum).

<sup>40</sup> See, e.g., N.C. CONST. of 1776, art. XLI, available at <http://docsouth.unc.edu/unc/uncbk1017/uncbk1017.html> (“That a School or Schools shall be established by the Legislature, for the convenient Instruction of Youth, with such Salaries to the Masters, paid by the public, as may enable them to instruct at low Prices; and all useful Learning shall be duely encouraged and promoted in one or more Universities.”). Many of these constitutional provisions were exact adoptions of the language within the Northwest Ordinance of 1787. See, e.g., MICH. CONST. of 1908, art. 8, § 1 (“Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

<sup>41</sup> The first public university, The University of North Carolina, was chartered by the state legislature on December 11, 1789. See 1 KEMP P. BATTLE, *HISTORY OF THE UNIVERSITY OF NORTH CAROLINA: FROM ITS BEGINNING TO THE DEATH OF PRESIDENT SWAIN, 1789–1868*, at 6 (1907) (quoting the school’s original charter: “[I]n all well regulated governments it is the indispensable duty of every legislature to consult the happiness of a rising generation, and endeavor to fit them for an honorable discharge of the social duties of life, by paying the strictest attention to their education, and that, a University, supported by permanent funds and well endowed, would have the most direct tendency to answer the above purpose”).

<sup>42</sup> Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 127–28 (2003).

<sup>43</sup> See EDWARD HUMES, *OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM* 5 (2006) (discussing how the G.I. Bill allowed for the transformation of “[c]ollege . . . from an elite

had a transformative effect on higher education in the United States,<sup>45</sup> with over two million veterans attending college after World War II and approximately five million veterans acquiring vocational trade skills.<sup>46</sup> Specifically, the G.I. Bill provided veterans who had served at least ninety days of active duty with \$500 for tuition and also monetary stipends for the costs of attending college, graduate school, or vocational training.<sup>47</sup> Veterans could use their G.I. Bill educational benefits at any public or private accredited college or university,<sup>48</sup> as well as at other for-profit or proprietary institutions of higher education.<sup>49</sup>

Like with earlier land grants,<sup>50</sup> the G.I. Bill limited the federal government's oversight of higher education by granting significant autonomy to the beneficiary students.<sup>51</sup> This discretion regarding the students' choices of postsecondary institutions allowed for increased access for these new populations of students to a much larger selection of schools.<sup>52</sup> This breadth of choice was opposed by many leaders of prestigious schools who feared that their "elite" institutions would be overrun by "non-elite" students and who favored the former exclusivity of

---

bastion to a middle-class entitlement"); President Franklin D. Roosevelt, Statement on Signing the G.I. Bill (June 22, 1944), available at <http://docs.fdrlibrary.marist.edu/odgist.html> ("[The G.I. Bill] provide[s] the special benefits which are due to the [men and women] of our armed forces—for they have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and are entitled to definite action to help take care of their special problems." (internal quotation marks omitted)).

<sup>44</sup> Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, § 400(a), 58 Stat. 284, 287–91 (1944).

<sup>45</sup> See Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 973 (2008) ("In total, the G.I. Bill's education and training provisions completely reoriented the tenor of higher education in the United States.").

<sup>46</sup> See Lizette Alvarez, *Combat to College*, N.Y. TIMES, Nov. 2, 2008, Educational Life Supp. at 24 (discussing the wide-ranging impact of the G.I. Bill for World War II veterans).

<sup>47</sup> Servicemen's Readjustment Act of 1944 § 400(a).

<sup>48</sup> See Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and Modernization of Education Benefits Under the Post-9/11 Veterans Assistance Act of 2008*, 2 VETERANS L. REV. 185, 190–91 (2010) (describing the G.I. Bill's "open-ended right" provisions regarding students' choices of institutions of higher education).

<sup>49</sup> See ARTHUR M. COHEN WITH CARRIE B. KISER, *THE SHAPING OF AMERICAN HIGHER EDUCATION: EMERGENCE AND GROWTH OF THE CONTEMPORARY SYSTEM* 456 (2d ed. 2010) (discussing how the G.I. Bill enabled students to attend for-profit vocational schools of higher education).

<sup>50</sup> See *supra* notes 38–39 and accompanying text (describing land grants that allowed states to start institutions of higher learning).

<sup>51</sup> See MARTIN TROW, *TWENTIETH-CENTURY HIGHER EDUCATION: ELITE TO MASS TO UNIVERSAL* 201 (Michael Burrage ed., 2010) (discussing how the G.I. Bill was an example of "the sharp separation of financial support from academic influence—that marked earlier federal policy").

<sup>52</sup> See MILTON GREENBERG, *THE GI BILL: THE LAW THAT CHANGED AMERICA* 107 (1997) ("The GI Bill was rooted in the idea that the individual recipient of a benefit, not the government, could decide how and where to use it.").

higher education.<sup>53</sup> In actuality, however, the majority of veterans who participated in the initial G.I. Bill educational benefits program attended proprietary schools.<sup>54</sup>

While the statutory intent of the G.I. Bill was one of limited government, it actually marked a sea change in the relationship between the federal government and these colleges and universities. Although the G.I. Bill attempted to conform to the previous federal pattern of limited oversight for higher education,<sup>55</sup> the introduction of such substantial federal funds for postsecondary education inevitably led to increased federal control over this area.<sup>56</sup> As one scholar put it:

[B]y initiating the first big surge in demand for higher education and helping to insure that the enterprise became too big and important for government to ignore for long, [the G.I. Bill] marked the beginning of the end of the era of true independence from government for much of the private sector.<sup>57</sup>

Despite the G.I. Bill's successes in its expansive extension of access to higher education to veterans from lower socioeconomic backgrounds,<sup>58</sup> which ultimately created a "post-World War II middle class,"<sup>59</sup> increased governmental intervention became necessary to truly open these doors for

---

<sup>53</sup> See, e.g., NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 59 (1999) (discussing then-Harvard University President James Bryant Conant's opposition to the G.I. Bill's "free, universally redeemable ticket to higher education, which [he] believed was already overpopulated").

<sup>54</sup> See GARY A. BERG, *LESSONS FROM THE EDGE: FOR-PROFIT AND NONTRADITIONAL HIGHER EDUCATION IN AMERICA* 41 (2005) ("Proprietary schools served more students on the G.I. Bill than any other institutional type."). In some instances, these proprietary institutions defrauded students of tuition funds while not providing the promised education. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1239–40 (2003) ("Veterans initially faced unscrupulous practices by proprietary schools that promised programs that they did not deliver or otherwise engaged in fraudulent schemes.").

<sup>55</sup> See Zumeta, *supra* note 39, at 376 (deeming the G.I. Bill "a deliberate choice by the federal government to stay out of the details of the operations of higher education").

<sup>56</sup> See Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J.C. & U.L. 691, 726 (2010) (discussing the G.I. Bill and increased federal oversight for higher education).

<sup>57</sup> Zumeta, *supra* note 39, at 376.

<sup>58</sup> See William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy*, 25 HOFSTRA L. REV. 1, 19 (1996) (noting that the G.I. Bill "uplifted millions of those poor to a new middle-class status"); William M. Wiecek, "America in the Post-War Years: Transition and Transformation," 50 SYRACUSE L. REV. 1203, 1211 (2000) (describing how the G.I. Bill "underwrote . . . the rise into the comfortable middle class of countless families and individuals who might otherwise have spent their lives struggling to make ends meet").

<sup>59</sup> Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 65 TENN. L. REV. 925, 943 (1998).

people of color, women, and individuals with disabilities.<sup>60</sup> Despite the notion that the G.I. Bill was “race- and gender-neutral in [its] design,”<sup>61</sup> the actual choices in educational opportunity for non-white or non-male veterans were much more circumscribed.<sup>62</sup> Consequently, further congressional action was required in order to facilitate increased access for greater populations of Americans.

Twenty years after the enactment of the G.I. Bill, other federal legislation began to expand educational opportunities to larger groups of people and cemented the federal government’s active involvement in educational policy.<sup>63</sup> This legislation included the Civil Rights Act of 1964,<sup>64</sup> which, in Title VI, prohibited discrimination based on “race, color, or national origin” by programs like colleges and universities that receive “Federal financial assistance.”<sup>65</sup> Building upon many of the premises of the Civil Rights Act, Congress also passed the Elementary and Secondary Education Act of 1965,<sup>66</sup> which intended “to improve the educational opportunities of poor students and to obligate those districts receiving Title I funds to comply with various federal non-discrimination statutes,”<sup>67</sup> thereby acting as a pipeline for the broadening of opportunities in postsecondary education. Subsequently, the Higher Education Act<sup>68</sup> was

---

<sup>60</sup> See Guinier, *supra* note 42, at 127–28 (“[L]egal challenges, social movements, and a participatory conception of individual rights helped pressure these institutions of higher education to open their doors—albeit only a crack—to those [non-white, non-male, non-rich students] who had been shut out.” (footnote omitted)).

<sup>61</sup> John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 794 (2009).

<sup>62</sup> See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 129 (2005) (noting that the educational choices of black veterans under the G.I. Bill were circumscribed because “[e]ven outside the South, black access to primarily white colleges and universities remained limited”); SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* 149 (2005) (discussing how female veterans were not provided with the informational counseling under the G.I. Bill that was routinely provided to male veterans).

<sup>63</sup> See, e.g., Julia Hanna, *The Elementary and Secondary Education Act: 40 Years Later*, ED. (June 1, 2005), [http://www.gse.harvard.edu/news/2005/0819\\_esea.html](http://www.gse.harvard.edu/news/2005/0819_esea.html) (noting that since the passage of the ESEA, “the government’s involvement in education policy has come to seem a given”); *Education and Title VI*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last modified Mar. 14, 2005) (discussing how the Department of Education’s Office for Civil Rights enforces Title VI of the Civil Rights Act of 1964 in all educational institutions that receive federal funds).

<sup>64</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2006)).

<sup>65</sup> *Id.* tit. VI, § 601 (codified as amended at 42 U.S.C. § 2000d).

<sup>66</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

<sup>67</sup> Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 314 (2010).

<sup>68</sup> Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

enacted “[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”<sup>69</sup> Title IX of the Education Amendments of 1972<sup>70</sup> generally prohibited gender-based discrimination in institutions of higher education.<sup>71</sup> Increased access for persons with disabilities was extended by the passages of the Rehabilitation Act of 1973,<sup>72</sup> which prohibited institutions of higher education from discriminating based on disability in section 504;<sup>73</sup> the Education for All Handicapped Children Act of 1975,<sup>74</sup> which provided for the comprehensive education of children with disabilities and facilitated college attendance by students with disabilities;<sup>75</sup> and the Americans with Disabilities Act of 1990,<sup>76</sup> which “extend[ed] the protections of Section 504 [of the Rehabilitation Act of 1973] to a much broader segment of society.”<sup>77</sup>

Despite the passage of this extensive legislation, increased access to higher education has not been automatic. Legislative efforts to increase diversity in higher education institutions’ student bodies often required supplementation by the courts and increased advocacy for equal opportunity. Court decisions prior to<sup>78</sup> and considerably after<sup>79</sup> much of

---

<sup>69</sup> *Id.* pmb., 79 Stat. at 1219.

<sup>70</sup> Education Amendments of 1972, Pub. L. No. 92-318, § 181, 86 Stat. 235, 304–12 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

<sup>71</sup> See Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 WASH. & LEE L. REV. 35, 46 (1993) (discussing the institutional exceptions to Title IX).

<sup>72</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)).

<sup>73</sup> See 29 U.S.C. § 794 (prohibiting any program or activity receiving federal financial assistance from discriminating against individuals with disabilities).

<sup>74</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (current version at 20 U.S.C. §§ 1405–1406, 1415–1420 (2012)).

<sup>75</sup> See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 847 (2010) (noting the purpose and effect of the Education for All Handicapped Children Act).

<sup>76</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12223 (2006)).

<sup>77</sup> Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading*, 63 MD. L. REV. 122, 133 (2004).

<sup>78</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that an African-American student, “having been admitted to a state-supported graduate school [at the University of Oklahoma], must receive the same treatment at the hands of the state as students of other races”); *Sweatt v. Painter*, 339 U.S. 629, 634–35 (1950) (holding that an African-American student must be admitted to the University of Texas Law School as “legal education equivalent to that offered by the State to students of other races . . . [was] not available to him in a separate law school as offered by the State”); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 633 (1948) (finding that the State of Oklahoma must provide an African-American student with legal education “in conformity with

this legislation, affirmative action programs,<sup>80</sup> social movements,<sup>81</sup> and the acts of courageous individuals<sup>82</sup> all formed the basis for the desegregation of college and university campuses,<sup>83</sup> as well as the foundation for the achievement of greater equity in higher education for women<sup>84</sup> and students with disabilities.<sup>85</sup> In more recent years, higher educational institutions have attempted to improve access in terms of sexual orientation<sup>86</sup> and citizenship status.<sup>87</sup> All of these progressions, alongside the administration of Title IV programs that provide more than \$150 billion annually “in new federal aid to approximately fourteen million post-

---

the Equal Protection Clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group”).

<sup>79</sup> See *United States v. Fordice*, 505 U.S. 717, 729 (1992) (holding that Mississippi did not fulfill its affirmative obligation to dismantle its prior de jure segregation system in higher education by the adoption and implementation of race neutral policies to govern colleges and universities); *Adams v. Richardson*, 356 F. Supp. 92, 94–95 (D.D.C. 1973) (requiring desegregation in higher education and serving as the impetus for extensive changes in the admissions policies of colleges and universities), *modified in part en banc*, 480 F.2d 1159 (D.C. Cir. 1973).

<sup>80</sup> See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1776 (2004) (discussing how affirmative action was essential to ending “the period of massive resistance . . . passive resistance and deliberate foot-dragging” to desegregation in higher education).

<sup>81</sup> See Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 980 (2010) (“It took from 1936 to 1963—a period that included the civil rights movement—until every Southern state enrolled at least one black student at a white institution of higher learning.”).

<sup>82</sup> See, e.g., CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS I* (2009) (discussing James Meredith’s quest to become the first African-American student at the University of Mississippi).

<sup>83</sup> See Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 392–96 (2005) (discussing the series of court decisions that provided desegregation remedies for institutions of higher education).

<sup>84</sup> See BARBARA MILLER SOLOMON, *IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA*, at xviii (1985) (discussing how governmental efforts and public advocacy, over centuries, increased women’s access to institutions of higher education).

<sup>85</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-33, *HIGHER EDUCATION AND DISABILITY: EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ITS ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS* 8 (2009) (“In 2008, students with disabilities represented an estimated 11 percent of all postsecondary students . . .”). See generally Rothstein, *supra* note 75, at 844 (providing a comprehensive discussion of the expansion of rights for individuals with disabilities from 1960 to 2010).

<sup>86</sup> See, e.g., Eric Hoover, *Elmhurst College Will Ask Applicants About Sexual Orientation*, HEAD COUNT (Aug. 23, 2011, 10:49 PM), <http://chronicle.com/blogs/headcount/elmhurst-college-will-ask-applicants-about-sexual-orientation/28553> (discussing the first postsecondary “institution to include a question about sexual orientation and gender identity on its undergraduate admissions application” as a means to increase diversity).

<sup>87</sup> See Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CALIF. L. REV. 1215, 1247 (2008) (“Over the past decade, questions over the right of undocumented students to access public higher education have been a battleground in the larger political and cultural struggle over immigration.”).

secondary students and their families,”<sup>88</sup> demonstrate the dynamic changes that have taken place with respect to increased access for all students in institutions of higher education.<sup>89</sup>

In sum, the movement in higher education toward greater access to opportunity for students has evolved slowly. Significantly, the catalysts for this expansive change have not typically been individual institutional initiatives. Instead, the origin for increased educational access has predominantly been federal legislation with supplemental auxiliary support. This pattern remains the same for the problem of growing student loan debt burdens. Consequently, colleges and universities will need more than a federal nudge to provide informed access.<sup>90</sup> What must be required is a statutory and regulatory mandate to provide enhanced student loan counseling in order to educate students about college costs, attendant debt issues, and the potential impacts of both factors on future finances. This legislative initiative will help ensure the continued dynamism of access to higher education in the United States.

### III. PRESENT CHALLENGES TO ACCESS: RISING COSTS AND STUDENT LOAN DEBT LEVELS

The challenges that most students face today in higher education are not de jure barriers to access based on demographic factors.<sup>91</sup> Instead, challenges to access now come primarily in the form of continual cost increases and prohibitively high debt loads. These dual burdens have

---

<sup>88</sup> Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 435 (D.C. Cir. 2012) (quoting Career Coll. Ass’n v. Duncan, 796 F. Supp. 2d 108, 113–14 (D.D.C. 2011)).

<sup>89</sup> Although efforts to increase access to higher education have improved, reforms are still needed in order to attain true equity of opportunity. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 85, at 20–25 (discussing the challenges that postsecondary schools still face in supporting students with disabilities); Leslie Miller-Bernal, *Coeducation: An Uneven Progression*, in GOING COED: WOMEN’S EXPERIENCES IN FORMERLY MEN’S COLLEGES AND UNIVERSITIES, 1950–2000, at 3, 14 (Leslie Miller-Bernal & Susan L. Poulson eds., 2004) (stating that coeducation is not the equivalent of equal education and discussing research that demonstrates continued disadvantages for women in colleges and universities); Todd A. DeMitchell & Suzanne Eckes, *Sexual Orientation and the College Campus*, 254 EDUC. L. REP. 19, 20 (2010) (discussing the discrimination faced by LGBT students on college campuses); Michele S. Moses, *Race, Affirmative Action, and Equality of Educational Opportunity in a So-Called “Post-Racial” America*, 20 KAN. J.L. & PUB. POL’Y 413, 423 (2011) (discussing how the pervasive inequalities in K–12 education signify that “meaningful access to higher education often is not realistic for Black students and other underrepresented students of color”).

<sup>90</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 143 (2009) (discussing various “federal nudges” that could assist in dealing with the problems related to the accumulation of higher education student loans).

<sup>91</sup> This is not to say, however, that universal access to higher education has been achieved. See Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 100 (2011) (“[G]aps in college and university access remain significant for low-income Americans and ethnic and racial minorities, even after controlling for college and university preparation.”).



become absolute bars (or significant impediments) to attendance for many students.<sup>92</sup> Colleges and universities have not been able to reign in these increases and have done relatively little to curb overall student loan debt levels. Further, although federal student loans constitute the bulk of all student borrowing, the current statutory and regulatory requirements governing these loans do not adequately address the challenges to access. Consequently, federal governmental reforms to the direct federal student loan program are necessary in order to ameliorate the harms of rising postsecondary education costs and student loan debt levels.

Despite institutional myopia,<sup>93</sup> increasing costs have become systemic to higher education.<sup>94</sup> Over the last twenty-five years, college tuition and fees have risen 1120%—roughly four times the rate of the increase in the consumer price index<sup>95</sup> and three times the rate of overall inflation.<sup>96</sup> One source reported “[t]he cost of tuition alone has soared from 23% of median annual earnings in 2001 to 38% in 2010.”<sup>97</sup>

Tuition and fees are only one part of the overall cost of college and university attendance. In 2012–2013, the average total annual cost of attendance for a public, two-year commuter school student was \$15,584; for a public, four-year, in-state, on-campus student, it was \$22,261; for a public, four-year, out-of-state, on-campus student, it was \$35,312; and for a private, non-profit, four-year, on-campus student, it was \$43,289.<sup>98</sup> These average annual costs reflect the undergraduate student budgets created by college and university financial aid offices, which “form the basis for determining the total cost of attendance” and “can affect the

---

<sup>92</sup> See Peter Coy, *Student Loans: Debt for Life*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2012), <http://www.businessweek.com/articles/2012-09-06/student-loans-debt-for-life#p1> (discussing how “[t]he poor, who need the boost that a college education can provide, are suffering the most” from the high costs of attendance at traditional four-year colleges); *Tuition Costs Hurting Students, Colleges*, MARKETPLACE (Apr. 1, 2009), <http://www.marketplace.org/topics/life/tuition-costs-hurting-students-colleges> (“Tuition has increased so much that even high-income families have to stretch.”).

<sup>93</sup> See Sara Hebel, *Board Members Say College Costs Too Much, but Not at Their Institution*, CHRON. HIGHER EDUC. (Dec. 13, 2012), <http://chronicle.com/article/Board-Members-Say-College/136291/> (“Most members of college boards believe that higher education costs too much, but a majority also say their own institutions’ prices aren’t the problem . . .”).

<sup>94</sup> See DONNA M. DESROCHERS & JANE V. WELLMAN, DELTA COST PROJECT, TRENDS IN COLLEGE SPENDING 1999–2009, at 18 (2011), available at [http://www.deltacostproject.org/resources/pdf/Trends2011\\_Final\\_090711.pdf](http://www.deltacostproject.org/resources/pdf/Trends2011_Final_090711.pdf) (finding that both public and private, non-profit four-year institutions significantly increased tuition and fees in response to the Great Recession).

<sup>95</sup> Jamrisko & Kolet, *supra* note 21.

<sup>96</sup> *The College Cost Calamity*, ECONOMIST (Aug. 4, 2012), <http://www.economist.com/node/21559936>.

<sup>97</sup> *Id.*

<sup>98</sup> SANDY BAUM & JENNIFER MA, COLLEGEBOARD, TRENDS IN COLLEGE PRICING 2012, at 11 fig.1 (2012), available at [http://trends.collegeboard.org/sites/default/files/college-pricing-2012-full-report\\_0.pdf](http://trends.collegeboard.org/sites/default/files/college-pricing-2012-full-report_0.pdf). Average net prices are lower than these amounts. *Id.* at 19–21.

financial aid for which students are eligible.”<sup>99</sup> Based on the most recent report from the National Center for Education Statistics—which collects and analyzes educational data as part of the United States Department of Education—the average total annual cost in 2007–2008 for a full-time graduate degree program was \$34,600 for a master’s degree, \$39,700 for a doctoral degree, and \$46,500 for a first professional degree.<sup>100</sup> More specifically, for the 2010–2011 academic year, the average total annual cost to attend a public law school as an in-state student was almost \$40,000; the cost to attend a public law school as an out-of-state student was over \$52,000; and the cost to attend a private law school was a little over \$58,000.<sup>101</sup> In 2010–2011, the average four-year costs of attendance for private and public medical schools were \$263,964 and \$187,393, respectively.<sup>102</sup>

The costs of higher education have increased for a variety of reasons.<sup>103</sup> Many of these costs have resulted from external factors related to the funding of colleges and universities. Significantly, the macro-economic impact of the latest financial crisis has substantially affected postsecondary educational cost increases.<sup>104</sup> Indeed, the financial crisis and recession eroded both state and private funding streams, causing many institutions to raise tuition and fees.<sup>105</sup>

This latest downturn in the economy has not been the sole external factor resulting in increased costs for college and university attendance.<sup>106</sup>

<sup>99</sup> *Id.* at 11.

<sup>100</sup> SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2011, at 130 (2011), available at <http://nces.ed.gov/pubs2011/2011033.pdf>.

<sup>101</sup> *Law Students: What’s Your Average Cost of Law School?*, ACCESS GRP., <http://www.accessgroup.org/paying-for-school/how-much-will-it-cost/law-students-whats-your-average-cost-of-law-school> (last visited Sept. 15, 2013).

<sup>102</sup> Carolyn Krupa, *Medical Students Still Burdened by High Debt Loads*, AM. MED. NEWS (Aug. 27, 2012), <http://www.amednews.com/article/20120827/profession/308279940/6/>.

<sup>103</sup> See generally RONALD EHRENBURG, TUITION RISING: WHY COLLEGE COSTS SO MUCH (2000) (citing multiple reasons for the increases in the costs of higher education, including endowment and development policies, program rankings, admissions and financial aid policies, research costs, faculty salaries, tenure processes, administrative costs, benefits, deferred maintenance, capital campaigns, physical space requirements, internal transfer prices, enrollment management, information technology, libraries, transportation costs, infrastructure, athletics programs, and dining and housing costs).

<sup>104</sup> See Kim Clark, *The Great Recession’s Toll on Higher Education*, U.S. NEWS & WORLD REP. (Sept. 10, 2010), <http://www.usnews.com/education/articles/2010/09/10/the-great-recessions-toll-on-higher-education> (outlining the “devastating effect” the Great Recession has had on higher education); see also BAUM & MA, *supra* note 98, at 13–15 (discussing the impact of the Great Recession on colleges and universities).

<sup>105</sup> See Andrew Martin, *Building a Showcase Campus, Using an I.O.U.*, N.Y. TIMES, Dec. 14, 2012, at A1 (discussing decreases in traditional sources of revenue such as state appropriations, as well as private sources of revenue like cash, pledged gifts, and investments).

<sup>106</sup> See, e.g., Frances R. Hill, *University Endowments: A (Surprisingly) Elusive Concept*, 44 NEW ENG. L. REV. 581, 582 (2010) (noting that the Great Recession only provided additional cost requirements for institutions of higher education).

Throughout the last fifteen years, both public and private non-profit schools of higher education have received fewer direct allocations of federal, state, and local appropriations.<sup>107</sup> Accreditation processes and expectations have also led to increased prices in higher education.<sup>108</sup> Finally, external review through the national rankings publication process and the resulting actions to attract increased student enrollments have caused costs to escalate.<sup>109</sup> Each of these external factors has increased costs of higher learning.

In addition to external pressures, internal institutional forces have resulted in increasing costs of student attendance. These internal constraints often result from an unattainable attempt to be all things to all people;<sup>110</sup> they have generated “the equivalent of an arms race of spending to improve . . . absolute quality and . . . relative stature.”<sup>111</sup> These internal factors include both instructional and non-instructional line items. Faculty retention and recruitment have driven up costs, as instructional spending consistently constitutes the most substantial item of total expenditures for schools, with faculty salaries and benefits being the largest share of that expenditure.<sup>112</sup> However, due to a national trend of hiring more non-tenured and part-time faculty members<sup>113</sup> who typically receive lower salaries than tenure-track and tenured professors and fewer or no benefits,<sup>114</sup> instructional spending is by no means the sole internal factor

---

<sup>107</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-179, POSTSECONDARY EDUCATION: FINANCIAL TRENDS IN PUBLIC AND PRIVATE NONPROFIT INSTITUTIONS 13 (2012) (finding that most schools of higher education have seen “decreases in state and local appropriations” from 1999 to 2009); see also James, *supra* note 91, at 100 (citing losses in state and federal financial support as the primary reason for increasing costs of higher education); Josh Mitchell, *Costs—As Student Debt Grows, Possible Link Seen Between Federal Aid and Rising Tuition*, WALL ST. J., June 11, 2012, at A3 (citing cuts in state funding as one reason for rising costs in higher education).

<sup>108</sup> See Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67, 79–80 (2010) (arguing that accreditation processes have contributed to increased costs in the law school segment of higher education).

<sup>109</sup> See Howard, *supra* note 19, at 497 (arguing that the costs of higher education have increased in an attempt to garner higher rankings and to attract greater enrollment).

<sup>110</sup> See Hugo F. Sonnenschein, *In Memoriam: Edward H. Levi (1912–2000)*, 67 U. CHI. L. REV. 967, 968 (2000) (quoting former Attorney General and noted American academic Edward H. Levi as stating, “A university which claims to be all things to all people, or as many different things as different groups wish it to be, is deceitful or foolish or both”).

<sup>111</sup> EHRENBURG, *supra* note 103, at 277.

<sup>112</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 107, at 17, 19 (noting that from 1999 through 2009, “[i]nstructional spending consistently made up the largest share of total expenditures” at nonprofit schools—with faculty salaries comprising seventy percent of all instructional costs).

<sup>113</sup> See *id.* at 21 (citing the increased hiring of non-tenured track professors at a rate of “31 to 34 percent at public schools and from 37 to 39 percent at private nonprofit schools” as a means, in part, to “address[] budget constraints”).

<sup>114</sup> See *id.* (providing that the reduced payment and benefits to non-tenured and part-time faculty members “result in cost savings for schools”).

increasing costs on college campuses.<sup>115</sup>

Non-instructional spending has increased significantly for both public and private non-profit schools.<sup>116</sup> The hiring of non-instructional staff, mostly at the executive managerial level, has spurred increased expenditures in higher education.<sup>117</sup> The compensation and benefits packages for these top personnel can be large expenditures,<sup>118</sup> thereby increasing costs for students.<sup>119</sup> The nationwide ratio of two full-time administrators to every one tenured or tenure-track faculty member evidences this problem of administrative bloat.<sup>120</sup> Further, these growing numbers of administrators have created “bureaucratic entropy,” in which executives and governing boards have consolidated “control over institutional priorities.”<sup>121</sup> The result of this consolidation is an increase in costs, with research finding that these “decisions accounted for a \$2 increase in cost for every \$1 increase caused by external factors.”<sup>122</sup>

Another internal cost factor involves the rapid expansion of student services, like housing and dining facilities, due to “competition among schools to meet student and parent expectations.”<sup>123</sup> Multiple colleges and universities have spent tremendous amounts of money, acquiring significant debt in the process, in order to provide lavish physical facilities like “student unions with movie theaters and wine bars; workout facilities

---

<sup>115</sup> *Not What It Used to Be*, ECONOMIST (Dec. 1, 2012), <http://www.economist.com/news/united-states/21567373-american-universities-represent-declining-value-money-their-students-not-what-it> (“[E]xpenditures on instruction have risen more slowly than in any other category of spending.”).

<sup>116</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 107, at 22 (reporting that from 1999 through 2009, the average spending per student on noninstructional activities increased at both public and private schools).

<sup>117</sup> See *id.* at 25 (“From the 2003–2004 through 2009–2010 school years, noninstructional staff increased at public and private nonprofit schools by 10 and 9 percent, respectively. Most of the increase reflected growth in executive managerial staff that provide institutional support, which increased 14 percent at public schools and 21 percent at private nonprofit schools.”).

<sup>118</sup> See, e.g., Jack Stripling, *Pay and Perks Creep Up for Private-College Presidents: Some of the Highest Paid Get Cash to Cover Taxes, Too*, CHRON. HIGHER EDUC. (Dec. 9, 2012), <http://chronicle.com/article/PayPerks-Creep-Up-for/136187/> (providing that “[i]n 2010, 36 private-college presidents earned more than \$1-million” and that many top administrators were beneficiaries of “gross[ing] up,” i.e., the provision of cash to pay taxes on benefits).

<sup>119</sup> See, e.g., Carly Q. Romalino, *Salaries of NJ Community College Presidents Scrutinized by State*, GLOUCESTER COUNTY TIMES (May 31, 2012), [http://www.nj.com/gloucester-county/index.ssf/2012/05/salaries\\_of\\_nj\\_community\\_colle.html](http://www.nj.com/gloucester-county/index.ssf/2012/05/salaries_of_nj_community_colle.html) (discussing concerns regarding whether executive compensation at community colleges “is consistent with the basic principal [sic] of affordability”).

<sup>120</sup> See Jenny Rogers, *3 to 1: That’s the Best Ratio of Tenure-Track Faculty to Administrators*, CHRON. HIGHER EDUC. (Nov. 1, 2012), <http://chronicle.com/article/Administrative-Bloat-How-Much/135500/>.

<sup>121</sup> Robert E. Martin, *College Costs Too Much Because Faculty Lack Power*, CHRON. HIGHER EDUC. (Aug. 5, 2012), <http://chronicle.com/article/College-Costs-Too-Much-Because/133357/> (claiming that the costs of higher education have increased based on “bureaucratic entropy”).

<sup>122</sup> Rogers, *supra* note 120.

<sup>123</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 107, at 23.

with climbing walls and ‘lazy rivers’; and dormitories with single rooms and private baths.”<sup>124</sup> Capital and maintenance costs are not limited to discretionary spending to attract potential students either; these costs also include deferred maintenance and “general deterioration of usable space.”<sup>125</sup> Finally, spending on athletic programs,<sup>126</sup> including expenses for athletic personnel,<sup>127</sup> and on technology<sup>128</sup> has also resulted in increased costs in higher education.

Given the decline in incomes at all income distribution levels over the past decade,<sup>129</sup> as well as the financial losses that accompanied the Great Recession,<sup>130</sup> these rising college costs have made it more difficult for many students and their families to access higher education.<sup>131</sup> These declines in access have been across the board, from community colleges<sup>132</sup> to four-year institutions.<sup>133</sup> Further, the rapid escalation of costs in higher education has had a disproportionate impact in terms of access for diverse

---

<sup>124</sup> Martin, *supra* note 105.

<sup>125</sup> Rita Kirshstein & Jane Wellman, *Technology and the Broken Higher Education Cost Model: Insights from the Delta Cost Project*, EDUCAUSE REV. (Sept. 5, 2012), <http://www.educause.edu/ero/article/technology-and-broken-higher-education-cost-model-insights-delta-cost-project>.

<sup>126</sup> See Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX “Compliance” by the Elimination of Men’s Collegiate Sports*, 34 U. MICH. J.L. REFORM 253, 261 (2001) (discussing the high costs of athletic programs in higher education); see also Steve Berkowitz et al., *How Student Fees Quietly Boost College Sports: As Athletics Budgets Rise, Priorities Are Questioned*, USA TODAY, Sept. 22, 2010, at A1 (“Students were charged more than \$795 million to support sports programs at 222 Division I public schools during the 2008–09 school year . . .”).

<sup>127</sup> See, e.g., Kristi Dosh, *Schools Pay Out \$31 Million to Fired Coaches*, ESPN (Dec. 6, 2012), [http://espn.go.com/blog/playbook/dollars/post/\\_id/2520/schools-pay-out-31-million-to-fired-coaches](http://espn.go.com/blog/playbook/dollars/post/_id/2520/schools-pay-out-31-million-to-fired-coaches) (“Athletic departments whose teams play football in the Football Bowl Subdivision have committed more than \$31 million to head coaches in recent weeks. The largesse didn’t go to the coaches who will lead their teams on the sidelines next season. No, this spending free-for-all covered parting gifts for their coaches to hit the road.”).

<sup>128</sup> See Macchiarola & Abraham, *supra* note 108, at 93 (citing increased spending on technology as a cause for increased costs in law schools).

<sup>129</sup> See BAUM & MA, *supra* note 98, at 9 (citing declining incomes as a significant issue related to college prices).

<sup>130</sup> See Arne Duncan, *Through the Schoolhouse Gate: The Changing Role of Education in the 21st Century*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 293, 305–06 (2010) (“In contrast to much of the twentieth century, when the U.S. economy and household wealth steadily grew, the first decade of the twenty-first century has already been called a ‘lost decade’ for the American workforce.”).

<sup>131</sup> See BAUM & MA, *supra* note 98, at 9 (“[F]amilies have not been able to plan for the fluctuations in the value of the assets they have saved to pay for college. Rising tuition levels cause even more problems because of the economic environment in which they are occurring.”).

<sup>132</sup> See *id.* at 18 fig.8 (showing that state funding limitations and tuition constraints have threatened access to community colleges).

<sup>133</sup> See Mamie Lynch et al., *Priced Out: How the Wrong Financial-Aid Policies Hurt Low-Income Students*, EDUC. TRUST 1 (June 2011), <http://www.edtrust.org/sites/edtrust.org/files/PricedOutFINAL.pdf> (discussing how the escalating costs of college education have served as barriers to access).

populations<sup>134</sup> and the lowest income families. In 2011, for one student to attend a four-year, public or private non-profit college, low-income families had to pay or borrow 72% of their family income, compared to 27% for middle-class families and only 14% for high-income families.<sup>135</sup> As a result, “the increasing costs and lack of access to means of financing [higher education] have reduced both equity in participation and created an underinvestment in higher education by the families without resources.”<sup>136</sup>

There have been some attempts to attack the rising costs of higher education and the concomitant barriers to access these costs engender. These efforts primarily have taken the form of protests<sup>137</sup> and lawsuits.<sup>138</sup> Despite their intended goals, these protests have been largely unsuccessful in their attempts to drive down college costs.<sup>139</sup> Likewise, although there have been a few instances of court-ordered recoveries for retroactive fee increases on a breach of implied contract theory,<sup>140</sup> lawsuits have not led to widespread eliminations of tuition and fee increases.<sup>141</sup> Consequently, neither of these avenues has resulted in any significant solutions to the

---

<sup>134</sup> See James Podgers, *Economy Hurting Diversity*, A.B.A. J., Mar. 2010, at 68, available at [http://www.abajournal.com/magazine/article/economy\\_hurting\\_diversity/](http://www.abajournal.com/magazine/article/economy_hurting_diversity/) (“[D]iverse populations often are most affected by rising tuition costs and heavy debt loads.”).

<sup>135</sup> Lynch et al., *supra* note 133, at 2 tbl.1.

<sup>136</sup> Henry M. Levin, *The Economics of Education*, 4 ALB. GOV’T L. REV. 394, 422 (2011).

<sup>137</sup> See, e.g., Alisha Azevedo, *Hacker Group Breaches Thousands of University Records to Protest Higher Education*, CHRON. HIGHER EDUC. (Oct. 3, 2012), <http://chronicle.com/blogs/wiredcampus/hacker-group-breaches-thousands-of-university-records-to-protest-higher-education/40348> (“A team of hackers claims to have broken into more than 120,000 computer accounts at dozens of universities to protest what it sees as the high cost and low quality of higher education.”); *As UC Berkeley Investigates Police Brutality Against Students Protesting Fee Hikes, a Report from Inside the Takeover of Wheeler Hall*, DEMOCRACY NOW (Nov. 24, 2009), [http://www.democracynow.org/2009/11/24/as\\_uc\\_berkeley\\_investigates\\_police\\_brutality](http://www.democracynow.org/2009/11/24/as_uc_berkeley_investigates_police_brutality) (discussing the 2009 protest of the University of California Board of Regents’s decision to raise tuition by thirty-two percent).

<sup>138</sup> See, e.g., Josh Keller, *U. of California Must Refund \$38-Million in Fees to Students, Judge Rules*, CHRON. HIGHER EDUC. (Mar. 12, 2010), <http://chronicle.com/article/article-content/64667/> (discussing a court’s decision that found a breach of implied contract by a university when it raised fees above what was provided for in the publicly available official fee guide after class members accepted admission).

<sup>139</sup> See Azevedo, *supra* note 137 (describing the overall impact of the hacking of university websites in protest of the high costs of education as being “minor”); *Regents Agree to Increase UC Tuition, Despite Protests*, LA JOLLA LIGHT (Nov. 19, 2009), <http://www.lajollalight.com/2009/11/19/regents-agree-to-increase-uc-tuition-despite-protests> (discussing the approval of a thirty-two percent tuition and fee increase “[d]espite raucous student protests”).

<sup>140</sup> See, e.g., *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 665 (Cal. Ct. App. 2007) (holding that the University of California “breached its contracts with the students . . . when it raised the educational fees for these terms after the students had received bills for these terms charging them a set fee to be paid by a particular date”).

<sup>141</sup> See, e.g., Larry Gordon, *UC Tuition May Rise Up to 16% a Year: Plan Is Called Just a Guideline*, L.A. TIMES, Sept. 15, 2011, at AA1 (reporting on a long-term plan to increase tuition fees at the University of California).

price tag problem of college and university attendance.

In light of these cost increases and faced with these potential barriers to access, a significant majority of postsecondary students have obtained student loans, taking on debt to finance the acquisition of degrees.<sup>142</sup> Most students agree to these debt obligations expecting an economic return on their investments.<sup>143</sup> However, excessive debts and inability to repay those debts have resulted in acute harms to individual students, their families, and society at large.<sup>144</sup> Ultimately, the collective acquisition of such substantial student loan debts will limit access to higher education, with a disparate impact on low-income and first-generation students.<sup>145</sup>

Approximately “two-thirds (66%) of college seniors who graduated in 2011 had student loan debt, with an average of \$26,600 for those with loans.”<sup>146</sup> This data is even more staggering for graduates of four-year, for-profit institutions of higher education, in that approximately 96% of those students have student loan debt at a borrowing rate of about 45% more than graduates of non-profit institutions.<sup>147</sup> With respect to advanced degrees, over 55% of all graduate-degree recipients in 2012 had student loan debt, at an average of \$43,500.<sup>148</sup> For 2011 law school graduates, the average debt burden was over \$75,700 for public law schools and almost

---

<sup>142</sup> See SANDY BAUM & KATHLEEN PAYEA, COLLEGEBOARD, TRENDS IN STUDENT AID 2012, at 9 (2012), available at <http://trends.collegeboard.org/sites/default/files/student-aid-2012-full-report.pdf> (“Student loans make it possible for many students who could not otherwise pay for college to gain the postsecondary experience they need to improve their life prospects. Just as most small business start-ups would be impossible to launch without loans that can be repaid out of future earnings, many students would be unable to invest in themselves without debt financing.”).

<sup>143</sup> See *Student Debt and the Class of 2011*, PROJECT ON STUDENT DEBT 2 (Oct. 2012), <http://projectionstudentdebt.org/files/pub/classof2011.pdf> (discussing the research that “continues to show strong economic returns on investments in college degrees”).

<sup>144</sup> See BAUM & PAYEA, *supra* note 142, at 9 (“Although postsecondary education has a higher success rate in terms of future earnings than small businesses, excessive debt and barriers to managing that debt create major difficulties for many students.”).

<sup>145</sup> See *Student Debt Burden*, POL’Y MATTERS (Am. Ass’n of State Colls. & Univs., Washington, D.C.) Aug. 2006, at 1, 1, available at <http://aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/StudentDebtBurden.pdf> (“The trend of heavy debt burdens threatens to limit access to higher education, particularly for low-income and first-generation students, who tend to carry the heaviest debt burden.”); see also Bradley J.B. Toben & Carolyn P. Osolinik, *Nonprofit Student Lenders and Risk Retention: How the Dodd-Frank Act Threatens Students’ Access to Higher Education and the Viability of Nonprofit Student Lenders*, 64 BAYLOR L. REV. 158, 159 (2012) (“[L]ower- and middle-income students, including large numbers of Latino and African-American students, face an increasingly challenging environment in which to find funding to cover the costs of postsecondary education.”).

<sup>146</sup> *Student Debt and the Class of 2011*, *supra* note 143, at 2.

<sup>147</sup> See *id.* at 13 (discussing student debt at for-profit colleges).

<sup>148</sup> Annamaria Andriotis, *Grad School: Higher Degrees of Debt*, WALL ST. J. (May 16, 2012), <http://online.wsj.com/article/SB70001424052702304192704577406652556893064.html>.

\$125,000 for private law schools.<sup>149</sup> Collectively, “36.2% of law school graduates and 49% of medical school graduates graduated with six-figure debt.”<sup>150</sup>

Federal student loans constitute the substantial bulk of all student borrowing<sup>151</sup>—approximately 93% in 2010–2011 and 2011–2012.<sup>152</sup> In 2011–2012, the total amount of federal student loans disbursed was approximately \$105 billion.<sup>153</sup> Federal student loans cumulatively “accounted for about 86% of the roughly \$1 trillion in student loans outstanding as of June 2012.”<sup>154</sup> Consequently, any reform to the general student loan debt issue must involve the process for allocating federal student loan money.

Given the substantial federal debt loan volume, it is unsurprising that the United States has recently attempted to implement a series of changes to improve the outcomes of its lending program and to ensure continued access to higher education. The most dramatic change to higher education financing took place in 2010, when the federal government reclaimed responsibility for the federal student loan market by eliminating private commercial banks as subsidized intermediaries in the federal lending process.<sup>155</sup> Through this action, the United States government eliminated the Federal Family Education Loan program,<sup>156</sup> thereby establishing the William D. Ford Federal Direct Loan Program as the sole source of all new federal student loan funds.<sup>157</sup> This restructuring of the federal loan market was accomplished via the Student Aid and Fiscal Responsibility Act,

<sup>149</sup> Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools*, A.B.A. J. (Mar. 28, 2012), [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m).

<sup>150</sup> Kantrowitz, *supra* note 8, at 1.

<sup>151</sup> Josh Mitchell, *Federal Student Lending Swells*, WALL ST. J., Nov. 28, 2012, at A1.

<sup>152</sup> BAUM & PAYEA, *supra* note 142, at 17 fig.6.

<sup>153</sup> See *id.* (providing that \$113.4 billion in student loans were disbursed in 2011–2012, with \$8.1 billion of that amount being non-federal loans, which include private loans, loans to students from states, and loans from institutions).

<sup>154</sup> Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 590 (2012).

<sup>155</sup> See Herszenhorn & Lewin, *supra* note 12 (discussing the federal student loan direct lending overhaul). The bill was signed into law on March 30, 2010. Press Release, White House Office of the Press Sec’y, President Obama Signs Historic Health Care and Education Legislation (Mar. 30, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-signs-historic-health-care-and-education-legislation>.

<sup>156</sup> See Nick Anderson & Alec MacGillis, *Obama’s Student Loan Plan Moving Forward with Health Bill*, WASH. POST, Mar. 18, 2010, at A2 (“The student loan measure would end . . . [the Federal Family Education Loan] program begun in 1965 that relies on banks and other financial institutions to lend students money for college while the government assumes virtually all the default risk.”).

<sup>157</sup> See *Student Loans Better for Students and Taxpayers*, PERFORMANCE.GOV, <http://goals.performance.gov/videos-and-feature-stories/student-loans-better-students-and-taxpayers> (last visited Sept. 15, 2013) (providing the Obama Administration’s perspective on the positive implications of the Student Aid and Fiscal Responsibility Act).



which was included as a rider on the enacted Health Care and Education Reconciliation Act of 2010.<sup>158</sup> By eliminating the student loan-related government subsidies given to financial institutions, the federal government is projected to save \$68 billion over eleven years, which will be used to expand Pell grants.<sup>159</sup>

In addition to addressing the process for the issuance of new federal student loans, the Obama Administration also has modified how existing and future student loans can be repaid. Student loan repayment plans were part of the reforms that were incorporated into law by the Reconciliation Act.<sup>160</sup> Specifically, the Act modified the statutory Income-Based Repayment Plan to change the cap on monthly student loan payments from 15% to 10% of discretionary income.<sup>161</sup> It also amended the loan forgiveness repayment period from twenty-five years to twenty years.<sup>162</sup> These changes were to become effective for “any loan made to a new borrower on and after July 1, 2014.”<sup>163</sup> Unsatisfied with the lag, the President announced the “Pay As You Earn” Plan for student loan repayment in October 2011, which would make the benefits outlined in the Reconciliation Act Income-Based Repayment Plan amendments available to certain borrowers prior to July 2014.<sup>164</sup> The Pay as You Earn Plan launched on December 21, 2012.<sup>165</sup>

---

<sup>158</sup> Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074 (codified as amended at 20 U.S.C. § 1071(d)(1) (2012)) (terminating the authority to make or insure new loans under the Federal Family Education Loan Program after June 30, 2010).

<sup>159</sup> See Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 31, 2010, at A14 (“The new law will eliminate fees paid to private banks to act as intermediaries in providing loans to college students and use much of the nearly \$68 billion in savings over 11 years to expand Pell grants and make it easier for students to repay outstanding loans after graduating.”); *The Health Care and Education Reconciliation Act*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education/making-college-affordable> (last visited Sept. 15, 2013) (explaining the various provisions and intended effects of the Health Care and Education Reconciliation Act). But see Tom Robinson, *SAFRA One Year Later*, UNIV. BUS. (June 2011), <http://www.universitybusiness.com/article/safra-one-year-later> (contesting the claimed savings of \$68 billion).

<sup>160</sup> See Health Care and Education Reconciliation Act of 2010, § 2213, 124 Stat. at 1081 (codified as amended at 20 U.S.C. § 1098e(e)) (modifying the statutory Income-Based Repayment Plan).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See Press Release, White House Office of the Press Sec’y, Fact Sheet: Help Americans Manage Student Loan Debt (Oct. 25, 2011), available at [http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt?utm\\_source=wh.gov&utm\\_medium=shorturl&utm\\_campaign=shorturl](http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl) (discussing President Obama’s announcement regarding the proposed Pay As You Earn Plan).

<sup>165</sup> Press Release, U.S. Dep’t of Educ., Education Department Launches ‘Pay As You Earn’ Student Loan Repayment Plan (Dec. 21, 2012), available at <http://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan>.

Although guided by good intentions,<sup>166</sup> these federal statutory and regulatory changes have some potentially negative aspects. Given the uncertainties tied to the statutory changes to the Income-Based Repayment Plan and the executively-mandated Pay As You Earn Plan, it is possible that the impact of these plans will be de minimis for lower-income borrowers, a population that is arguably in need of the most assistance.<sup>167</sup> Further, it has been argued that these changes will only further desensitize students to high tuition and fees.<sup>168</sup>

Another potential problem tied to these new plans is the likelihood of a substantially increased amount of interest that will be paid throughout the lifetime of the repayment plan.<sup>169</sup> This is especially problematic given that most student loan borrowers who opt for the Income-Based Repayment Plan “will repay their student loans *in full*.”<sup>170</sup> The possible tax consequences tied to the loan forgiveness also illustrate the negative aspects of these reformed plans, in that corresponding statutory changes were not made to the Internal Revenue Code at the time of the changes to the Income-Based Repayment Plan in the Reconciliation Act. Without these amendments, the forgiven loan amount could be treated as income, resulting in a substantial tax burden for that year.<sup>171</sup> Finally, these changes only make the loan repayment process even more complex for student loan borrowers, most of whom have relatively little financial experience or savvy.<sup>172</sup>

---

<sup>166</sup> See Megan Slack, *How President Obama Is Helping Lower Monthly Student Loan Payments*, WHITE HOUSE BLOG (Oct. 26, 2011, 11:11 AM), <http://www.whitehouse.gov/blog/2011/10/26/how-president-obama-helping-lower-monthly-student-loan-payments> (discussing the Executive Branch’s desire to help student loan borrowers as the motivation for the Pay As You Earn Plan).

<sup>167</sup> See, e.g., Jason Delisle & Alex Holt, *Safety Net or Windfall? Examining Changes to Income-Based Repayment for Federal Student Loans*, NEW AM. FOUND., at ii (Oct. 2012), [http://edmoney.newamerica.net/sites/newamerica.net/files/policydocs/NAF\\_Income\\_Based\\_Repayment.pdf](http://edmoney.newamerica.net/sites/newamerica.net/files/policydocs/NAF_Income_Based_Repayment.pdf) (asserting that the statutory changes to the Income-Based Repayment Plan and the Pay As You Earn Plan will result in minimal new benefits for lower-income borrowers).

<sup>168</sup> See Libby A. Nelson, *An Underused Lifeline*, INSIDE HIGHER ED (Oct. 23, 2012), <http://www.insidehighered.com/news/2012/10/23/despite-student-debt-concern-income-based-repayment-lags> (“[T]he expansion could encourage graduate schools to charge more, knowing students’ payments will be manageable no matter how much they borrow.”).

<sup>169</sup> See Slack, *supra* note 166 (“Although lower monthly payments may be better for some borrowers, lower payments may also mean you make payments for longer and the longer it takes to pay your loans, the more interest you pay compared to the standard repayment plan.”).

<sup>170</sup> *Examples of Borrowers Eligible for Income-Based Repayment (IBR) and the Current Tax Consequences for Those Receiving Loan Forgiveness*, PROJECT ON STUDENT DEBT 1 [http://www.projectonstudentdebt.org/files/pub/IBR\\_forgiveness\\_ex.pdf](http://www.projectonstudentdebt.org/files/pub/IBR_forgiveness_ex.pdf) (last visited Sept. 15, 2013).

<sup>171</sup> See Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later*, N.Y. TIMES, Dec. 15, 2012, at B1 (explaining that income tax must be paid on forgiven debt under the Income-Based Repayment Plan).

<sup>172</sup> For example, the “Pay As You Earn” Plan is now one of seven repayment plans for federal student loans. See *Repayment Plans*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/plans> (last visited Sept. 15, 2013) (providing a chart of the seven possible repayment

Consequently, these recent federal attempts to reform the student loan industry are not sufficient to fully address the problems attached to the growing debt load of American students.<sup>173</sup> These governmental changes do not provide the complete assistance that students need, especially as they are focused on payment plans after loan debts have been incurred.<sup>174</sup> Further, the federal government has not satisfied its obligations to provide complete information to student borrowers about the availability and implications of these alternate repayment plans, which was readily admitted in a June 2012 presidential memorandum.<sup>175</sup> The lack of information about repayment options is representative of the lack of information that is currently present at all stages of the student loan process, and it is a deficiency that needs to be remedied.<sup>176</sup> The loan counseling process would be an appropriate place to start to cure the problems of growing student loan debts and their impact on access to higher education.

#### IV. REFORMING THE FEDERAL STUDENT LOAN COUNSELING PROCESS TO PROMOTE INFORMED ACCESS AND TO REDUCE STUDENT DEBT BURDENS

Rather than limiting access to student loans or addressing the problem only after debts have been incurred,<sup>177</sup> more needs to be done to help students have informed access and avoid leveraging their entire future

---

plans and advising students to “[w]ork with your loan servicer to choose a federal student loan repayment plan that’s best for you”).

<sup>173</sup> See, e.g., Matt Leichter, *Income-Based Repayment: Lifeline for Law Graduates, Certain Loser for Government*, AM. L. DAILY (Oct. 11, 2012), [http://www.americanlawyer.com/PubArticleALD.jsp?id=1202574613758&IncomeBased\\_Repayment\\_Lifeline\\_for\\_Law\\_Graduates\\_Certain\\_Loser\\_for\\_Government&slreturn=20130102100548](http://www.americanlawyer.com/PubArticleALD.jsp?id=1202574613758&IncomeBased_Repayment_Lifeline_for_Law_Graduates_Certain_Loser_for_Government&slreturn=20130102100548) (discussing how the Income-Based Repayment Plan would result in additional interest payments for college graduates and characterizing the plan as “a bureaucratic, protracted Chapter 13 bankruptcy repayment plan that coincidentally allows the Department of Education to conceal the effective default rate on large federal student loans [for professional students]”).

<sup>174</sup> See Michael Stratford, *Obama’s ‘Pay as You Earn’ Plan for Student Borrowers Becomes Official*, CHRON. HIGHER EDUC. (Nov. 1, 2012), <http://chronicle.com/article/Obamas-Pay-as-You-Earn-Plan/135504/?key=Sj1xc1VrZSZAYCkYm5GYj9RO3VjMEJxMHdBaS1wbltWFA==> (discussing how the Pay As You Earn Plan helps student loan debtors after the debts have been incurred).

<sup>175</sup> See Memorandum on Improving Repayment Options for Federal Student Loan Borrowers, 77 Fed. Reg. 35,241 (June 7, 2012) (“[T]oo few borrowers are aware of the options available to them to help manage their student loan debt, including reducing their monthly payment through [the Income-Based Repayment Plan]. Additionally, too many borrowers have had difficulties navigating and completing the IBR application process once they have started it.”).

<sup>176</sup> See Ron Lieber, *Clearing Up Some Confusion About the New Federal Student Loan Rules*, N.Y. TIMES, Oct. 27, 2011, at B7 (providing that any change regarding student loans “almost inevitably leads to enormous confusion” and describing student loan borrowers as “befuddled” regarding the recent federal governmental reforms to student loan repayment plans).

<sup>177</sup> See *supra* text accompanying notes 33, 174.

financial livelihoods by acquiring such significant student loan debts.<sup>178</sup> There are many approaches to confronting this situation,<sup>179</sup> and certainly there is no panacea for the debt problem.<sup>180</sup> Given the gravity of the situation, however, innovative measures are needed that can help ameliorate the student loan debt issue. One such measure would be the enhancement of the statutory requirements of the Higher Education Act—along with the regulation promulgated pursuant to its authority—regarding the counseling that is attached to the acquisition of federal student loans. This proposed statutory change addresses what media and scholarly attention on the student debt crisis has largely ignored: the way students are educated about student loans before taking on excessive debts.<sup>181</sup> Further, although a moderate proposal, these changes are readily achievable and would serve the existing interests of students, the federal government, and institutions of higher education without directly limiting

<sup>178</sup> See Marcus, *supra* note 10 (“[S]ome college and university financial-aid departments don’t publicize their office hours or contact information, use technical language students don’t understand, provide materials only in English while serving more and more non-native-English speakers, are open only during the days when increasing numbers of students are taking night classes, and put their least experienced employees on the front lines to try to answer student questions.”).

<sup>179</sup> See, e.g., Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 475 (2012) (characterizing changes to aspects of the federal student loan repayment process as the “first tier of relief for a student-loan debtor”); Lonnie Golden, *Becoming Too Small to Bail? Prospects for Workers in the 2011 Economy and 112th Congress*, 87 IND. L.J. 11, 30 (2012) (touting the passage of the Student Aid and Fiscal Responsibility Act as an important reform for access to higher education); Karen Kornbluh & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL’Y REV. 73, 83 (2010) (arguing that the Obama Administration’s reforms of student loans were implemented to grow relative educational attainment, in the hope that these reforms would also lead to increases in economic competitiveness); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 143 (1996) (arguing for more leniency in the interpretation of the undue hardship standard in bankruptcy for the discharge of student loans); Kamille Wolff Dean, *Student Loans, Politics, and the Occupy Movement: Financial Aid Rebellion and Reform*, 46 J. MARSHALL L. REV. 105, 162–63 (2012) (advocating for the increased regulation of student loan lenders as one measure of student loan reform); Laura Miller, Comment, *The Option that Is Not an Option: The Invalidity of the Partial Discharge Option for the Student Loan Debtor*, 39 WAKE FOREST L. REV. 1053, 1075–76 (2004) (arguing for either the elimination of the undue hardship standard in bankruptcy for student loans or a declaration that all student loans are not dischargeable in bankruptcy).

<sup>180</sup> See Jill Riepenhoff & Mike Wagner, *Investigation: Federal Student Loans Become Constant Burden*, COLUMBUS DISPATCH (Dec. 16, 2012), <http://www.dispatch.com/content/stories/local/2012/12/16/constant.html> (noting that the calls for the discharge of student loans in bankruptcy, if heeded, would not result in a panacea for the debt problem).

<sup>181</sup> See, e.g., Robert B. Milligan, Comment, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 259–61 (2000) (discussing only exit counseling in relation to student loans); *The Latest Bubble?*, SCHUMPETER (Apr. 13, 2011, 11:50 PM), [http://www.economist.com/blogs/schumpeter/2011/04/higher\\_education](http://www.economist.com/blogs/schumpeter/2011/04/higher_education) (predicting disastrous results for the bursting of the higher education bubble, but not addressing the need for education prior to the acquisition of student loan debts).

access.<sup>182</sup> Instead, these amendments would allow for increased access to colleges and universities.

Under the current version of the Higher Education Act, two types of counseling are required concerning federal student loans: exit counseling and entrance counseling.<sup>183</sup> Congress added exit counseling to the Higher Education Act in 1986, and its plain language solely required that institutions make simple exit counseling available to borrowers.<sup>184</sup> More detailed information was added to this provision via the Higher Education Amendments of 1992, but this statutory addition still only required the exit counseling be made available for student borrowers.<sup>185</sup> In the Higher

---

<sup>182</sup> See Memorandum on Improving Repayment Options for Federal Student Loan Borrowers, 77 Fed. Reg. 35,241 (June 7, 2012) (articulating a desire to improve student access to information about student loans); Pardo & Lacey, *supra* note 17, at 439 (positing that “thoughtful credit counseling” could have resulted in lower amounts of student loan monies being acquired by individual students who now seek discharge of those debts in bankruptcy); Equal Justice Works, *Some Colleges Help Students Avoid, Handle Debt*, U.S. NEWS & WORLD REP. (Nov. 14, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/11/14/some-colleges-help-students-avoid-handle-debt> (describing various ways that some institutions of higher education are assisting students in avoiding or lowering debt levels).

<sup>183</sup> Higher Education Act of 1965, 20 U.S.C. § 1092(b), (l) (2012). In this section of the Article, the full text of each statutory change has been included within the footnotes to illustrate the progression of these counseling requirements and to demonstrate Congress’s past willingness to amend the statutes governing these processes.

<sup>184</sup> See Higher Education Amendments of 1986, Pub. L. No. 99-498, § 407(a), 100 Stat. 1268, 1483–84 (“Each eligible institution *shall*, through financial aid officers or otherwise, *make available* counseling to borrowers (individually or in groups) of loans which are made, insured, or guaranteed under part B of this title prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include— (1) general information with respect to the average indebtedness of students who have loans under part B or part E; and (2) the average anticipated monthly repayments, a review of the repayment options available, together with such debt and management strategies as the institution determines are designed to facilitate the repayment of such indebtedness. In the case of a borrower who leaves an institution without the prior knowledge of the institution, the institution shall attempt to provide the information to the student in writing.” (emphases added)).

<sup>185</sup> See Higher Education Amendments of 1992, Pub. L. No. 102-325, § 486(b), 106 Stat. 448, 621 (“Each eligible institution *shall*, through financial aid officers or otherwise, *make available* counseling to borrowers (individually or in groups) of loans which are made, insured, or guaranteed under part B (other than loans made pursuant to section 428B) of this title or made under parts D or E of this title prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include— (i) the average anticipated monthly repayments, a review of the repayment options available, and such debt and management strategies as the institution determines are designed to facilitate the repayment of such indebtedness; and (ii) the terms and conditions under which the student may obtain partial cancellation or defer repayment of the principal and interest pursuant to sections 428(b), 464(c)(2), and 465. (B) In the case of borrower who leaves an institution without the prior knowledge of the institution, the institution shall attempt to provide the information described in subparagraph (A) to the student in writing. (2)(A) Each eligible institution shall require that the borrower of a loan made under parts B, D, or E submit to the institution, during the exit interview required by this subsection— (i) the borrower’s expected permanent address after leaving the institution (regardless of the reason for leaving); (ii) the name and address of the borrower’s expected employer after leaving the institution; (iii) the address of the borrower’s next of kin; and (iv) any corrections in the institution’s records

Education Amendments of 1998, Congress added a provision that allowed institutions of higher education to utilize electronic means to deliver personalized exit counseling.<sup>186</sup> It was only in the last reauthorization of the Higher Education Act, the Higher Education Opportunity Act of 2008, that exit counseling became statutorily mandated for student borrowers.<sup>187</sup> This statutory amendment also substantially increased the amount of information that is to be conveyed during the exit counseling process.<sup>188</sup> Statutorily required entrance counseling prior to the first disbursement of student loan monies (and not prior to the signing of the master promissory note for the student loan) was only added as an amendment to the Higher

---

relating the borrower's name, address, social security number, references, and driver's license number. (B) The institution shall, within 60 days after the interview, forward any corrected or completed information received from the borrower to the guaranty agency indicated on the borrower's student aid records." (emphases added)).

<sup>186</sup> See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(b), 112 Stat. 1581, 1742 ("(C) Nothing in this subsection shall be construed to prohibit an institution of higher education from utilizing electronic means to provide personalized exit counseling.").

<sup>187</sup> See Higher Education Opportunity Act, Pub. L. No. 110-315, § 488(b), 122 Stat. 3078, 3295–96 (codified as amended at 20 U.S.C. § 1092(b)(1)(A)) ("Each eligible institution *shall*, through financial aid offices or otherwise, *provide* counseling to borrowers of loans that are made, insured, or guaranteed under part B (other than loans made pursuant to section 428C or loans under section 428B made on behalf of a student) or made under part D (other than Federal Direct Consolidation Loans or Federal Direct PLUS Loans made on behalf of a student) or made under part E of this title prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include— (i) information on the repayment plans available, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments, under each plan; (ii) debt management strategies that are designed to facilitate the repayment of such indebtedness; (iii) an explanation that the borrower has the options to prepay each loan, pay each loan on a shorter schedule, and change repayment plans; (iv) for any loan forgiveness or cancellation provision of this title, a general description of the terms and conditions under which the borrower may obtain full or partial forgiveness or cancellation of the principal and interest, and a copy of the information provided by the Secretary under section 485(d); (v) for any forbearance provision of this title, a general description of the terms and conditions under which the borrower may defer repayment of principal or interest or be granted forbearance, and a copy of the information provided by the Secretary under section 485(d); (vi) the consequences of defaulting on a loan, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation; (vii) information on the effects of using a consolidation loan under section 428C or a Federal Direct Consolidation Loan to discharge the borrower's loans under parts B, D, and E, including at a minimum— (I) the effects of consolidation on total interest to be paid, fees to be paid, and length of repayment; (II) the effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities; (III) the option of the borrower to prepay the loan or to change repayment plans; and (IV) that borrower benefit programs may vary among different lenders; (viii) a general description of the types of tax benefits that may be available to borrowers; and (ix) a notice to borrowers about the availability of the National Student Loan Data System and how the system can be used by a borrower to obtain information on the status of the borrower's loans . . . ." (emphases added)).

<sup>188</sup> See *id.* (mandating what information is to be conveyed to borrowers during exit counseling).

Education Act via the Higher Education Opportunity Act of 2008.<sup>189</sup> In December 1994, prior to these statutory requirements, the Department of Education promulgated final regulations regarding both required entrance and exit counseling.<sup>190</sup> There are currently no requirements, either statutory or regulatory, for interim counseling prior to the disbursement of each allocation of student loan money.<sup>191</sup>

Under the current authorizing statute and the Department of Education regulation, entrance and exit counseling may be conducted in person or

---

<sup>189</sup> See *id.* § 488(b), 122 Stat. at 3302–03 (codified as amended at 20 U.S.C. § 1092(l)) (“Entrance Counseling for Borrowers.—(1) Disclosure Required Prior to Disbursement.—(A) In General.—Each eligible institution shall, at or prior to the time of a disbursement to a first-time borrower of a loan made, insured, or guaranteed under part B (other than a loan made pursuant to section 428C or a loan made on behalf of a student pursuant to section 428B) or made under part D (other than a Federal Direct Consolidation Loan or a Federal Direct PLUS loan made on behalf of a student), ensure that the borrower receives comprehensive information on the terms and conditions of the loan and of the responsibilities the borrower has with respect to such loan in accordance with subparagraph (B). Such information—(i) shall be provided in a simple and understandable manner; and (ii) may be provided—(I) during an entrance counseling session conducted in person; (II) on a separate written form provided to the borrower that the borrower signs and returns to the institution; or (III) online, with the borrower acknowledging receipt of the information. (B) Use of Interactive Programs.—The Secretary shall encourage institutions to carry out the requirements of subparagraph (A) through the use of interactive programs that test the borrower’s understanding of the terms and conditions of the borrower’s loans under part B or D, using simple and understandable language and clear formatting. (2) Information to be Provided.—The information to be provided to the borrower under paragraph (1)(A) shall include the following: (A) To the extent practicable, the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance. (B) An explanation of the use of the master promissory note. (C) Information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary. (D) In the case of a loan made under section 428B or 428H, a Federal Direct PLUS Loan, or a Federal Direct Unsubsidized Stafford Loan, the option of the borrower to pay the interest while the borrower is in school. (E) The definition of half-time enrollment at the institution, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment. (F) An explanation of the importance of contacting the appropriate offices at the institution of higher education if the borrower withdraws prior to completing the borrower’s program of study so that the institution can provide exit counseling, including information regarding the borrower’s repayment options and loan consolidation. (G) Sample monthly repayment amounts based on—(i) a range of levels of indebtedness of—(I) borrowers of loans under section 428 or 428H; and (II) as appropriate, graduate borrowers of loans under section 428, 428B, or 428H; or (ii) the average cumulative indebtedness of other borrowers in the same program as the borrower at the same institution. (H) The obligation of the borrower to repay the full amount of the loan, regardless of whether the borrower completes or does not complete the program in which the borrower is enrolled within the regular time for program completion. (I) The likely consequences of default on the loan, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation. (J) Information on the National Student Loan Data System and how the borrower can access the borrower’s records. (K) The name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower’s rights and responsibilities or the terms and conditions of the loan.”).

<sup>190</sup> See Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (1995) (mandating that schools ensure borrowers complete entrance and exit counseling, as well as codifying what information must be provided to borrowers in each process).

<sup>191</sup> See 20 U.S.C. § 1092 (featuring no provision on interim counseling); 34 C.F.R. § 685.304 (same).

electronically.<sup>192</sup> The vast majority of this counseling is conducted online,<sup>193</sup> and it does not necessarily provide individualized information for the student borrower, because such personalization is not required by law.<sup>194</sup> For both entrance and exit counseling, a significant amount of information is required to be conveyed to the student loan borrower under the relevant statute.<sup>195</sup> Although the statutory provision for entrance counseling mandates that the loan information “shall be provided in a simple and understandable manner,”<sup>196</sup> it subsequently requires that eleven distinct items be provided to the borrower during entrance counseling.<sup>197</sup> Under the Higher Education Opportunity Act, nine distinct items are required for exit counseling.<sup>198</sup>

In accordance with the statutory and regulatory provisions regarding counseling borrowers, entrance and exit counseling may be completed via the Department of Education’s Federal Student Aid website.<sup>199</sup> However, these counseling processes, in their current forms, appear to be essentially pro forma exercises. For example, according to the website, entrance

---

<sup>192</sup> See 20 U.S.C. § 1092(b)(2)(C) (“Nothing in this subsection shall be construed to prohibit an institution of higher education from utilizing electronic means to provide personalized exit counseling.”); *id.* § 1092(l)(1)(A)(ii) (noting that information about the terms and conditions of the loan, and about the borrower’s responsibilities with respect to the loan, may be provided “(I) during an entrance counseling session conducted in person; (II) on a separate written form provided to the borrower that the borrower signs and returns to the institution; or (III) online, with the borrower acknowledging receipt of the information”); see also 34 C.F.R. § 685.304(a)(3) (providing that entrance counseling may be provided in person, on a written form acknowledged in writing by the borrower, or online); *id.* § 685.304(b)(2) (requiring that exit counseling be in person, by audiovisual presentation, or by interactive electronic means).

<sup>193</sup> See *Exit and Entrance Counseling*, FINAID, <http://www.finaid.org/loans/loancounseling.phtml> (last visited Sept. 15, 2013) (“Many colleges favor the use of web-based loan counseling . . .”).

<sup>194</sup> See 34 C.F.R. § 685.304(a)(6)(v) (providing that in entrance counseling the student borrower must be informed of sample monthly repayment amounts based on “a range of student levels of indebtedness” or “[t]he average indebtedness of other borrowers in the same programs at the same school”); *id.* § 685.304(b)(4)(i) (providing that exit counseling must “[i]nform the student borrower of the average anticipated monthly repayment amount based on the student borrower’s indebtedness or on the average indebtedness of student borrowers . . . for attendance at the same school or in the same program of study at the same school” (emphasis added)).

<sup>195</sup> See generally 20 U.S.C. § 1092(a) (detailing the required “information dissemination activities” schools must carry out).

<sup>196</sup> *Id.* § 1092(l)(1)(A)(i).

<sup>197</sup> *Id.* § 1092(l)(2)(A)–(K); see also *supra* note 189 (presenting the text of these current statutory provisions that require eleven distinct pieces of information for entrance counseling). The loan counseling regulation expands these statutory requirements to include twelve pieces of information. 34 C.F.R. § 685.304(a)(6)(i)–(xii).

<sup>198</sup> 20 U.S.C. § 1092(b)(1)(A)(i)–(ix); see also *supra* note 187 (presenting the text of these current statutory provisions that require nine distinct pieces of information for exit counseling). The loan counseling regulation expands these statutory requirements to include thirteen pieces of information. 34 C.F.R. § 685.304(b)(4)(i)–(xiii).

<sup>199</sup> *Choose Loan Counseling Type*, STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/counselingInstructions.action> (last visited Sept. 15, 2013).



counseling takes “20–30 minutes to complete.”<sup>200</sup> The exit counseling process “takes approximately 30 minutes to complete.”<sup>201</sup> In actuality, though, these processes can be completed in significantly less time—perhaps in as little as five minutes.<sup>202</sup> Given the tens (if not hundreds) of thousands of dollars that may be ultimately obtained in student loans, these short allotments of time do not indicate a serious effort to provide students with the necessary information to fully understand the significance of the legal responsibilities attached to the acquisition of student loans.<sup>203</sup>

Additionally, the inclusion of interactive quizzes as part of the entrance and exit counseling on the Department of Education’s website does not provide any meaningful education for the student borrower.<sup>204</sup> First, most online systems, like that on the governmental website, have no actual means to verify that the individual student borrower actually completes the process; the Department of Education’s online counseling only requires the student to provide his or her loan pin number and other identifying information.<sup>205</sup> Further, the system, at least in the past,<sup>206</sup> has featured an

<sup>200</sup> *Id.*

<sup>201</sup> *Exit Counseling: Basics*, STUDENTLOANS.GOV, [http://www.nsls.ed.gov/nsls\\_SA/SaEcTour.do?page=SaEcIntro2](http://www.nsls.ed.gov/nsls_SA/SaEcTour.do?page=SaEcIntro2) (last visited Sept. 15, 2013).

<sup>202</sup> See *Student Loan Entrance Counseling Is a Joke*, YOBUCKO (May 10, 2012), <http://yobucko.com/education/student-loan-entrance-counseling-is-a-joke> (providing that it took an individual five minutes to retake the student loan entrance counseling process that he or she completed “prior to taking out approximately \$120,000 in student loans”).

<sup>203</sup> See, e.g., Jhanay Davis, *Entrance Loan Counseling: You’re Joking, Right?*, INTERN SUITE (Aug. 29, 2011), [http://atlantatribune.typepad.com/the\\_life\\_and\\_times\\_of\\_and/2011/08/entrance-loan-counseling-youre-joking-right.html](http://atlantatribune.typepad.com/the_life_and_times_of_and/2011/08/entrance-loan-counseling-youre-joking-right.html) (“This 20–30 minute interactive quiz is supposed to give information about things like the Master Promissory Note (MPN), borrower’s rights, forbearance and default. While this concept sounds great in theory, the results are not that great in reality. It is only required of first-time borrowers, usually freshman students. Recent high school graduates are consumed by reflecting on high school, enjoying the summer before college and imagining the fun that college will bring. These 20–30 minutes do not compare to the other events in their memory banks.”).

<sup>204</sup> See *Exit Counseling: Basics*, *supra* note 201 (“There will be a series of short quizzes that you will be required to complete before continuing through the session.”).

<sup>205</sup> Although the Department of Education’s website warns that “[u]se of another person’s PIN constitutes fraud” and directs users to “[u]se only your own PIN information,” *Frequently Asked Questions: Entrance Counseling (Required)*, STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/faqs.action> (last visited Sept. 15, 2013), such a prescription contemplates the completion of the counseling by someone other than the student loan borrower. See also *Online Counseling*, MAPPING YOUR FUTURE, <http://mappingyourfuture.org/oslc/counseling/index.cfm?act=Intro&OslcTypeID=1> (select either a U.S. state or a country from the available drop-down menus, then click the “continue” button; select a school from the drop-down menu, then click the “continue” button) (providing the following instruction as part of online entrance counseling that satisfies the federal requirements for student loan counseling: “PARENTS: Please don’t complete the counseling session on behalf of your son or daughter, as this federal requirement helps the student understand the rights and responsibilities of borrowing a student loan”).

<sup>206</sup> See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2080 n.135 (2012) (citing to a website that provides the “questions and answers for the online entrance counseling test offered by the U.S. Department of Education,” which claimed that “[s]tudents can pass merely by answering ‘all of the above’ or ‘true’ to all of the questions”).

interactive quiz that does not provide a level of rigor to facilitate the student borrower's complete understanding of the nature of the financial agreement.<sup>207</sup> The ease of completion of these interactive exercises without greater holistic understanding reduces the impact of the possible positive "train-and-test model" for agreement to the student loan process.<sup>208</sup>

Consequently, despite the extensive amount of provisions within the authorizing statute and regulation, the current, mandatory student loan counseling process has not been effective in actually educating students as to the full extent of the legal responsibilities they acquire as a consequence of obtaining student loans.<sup>209</sup> The process has become so ineffective that, in at least one major study of approximately 13,000 present and former students,<sup>210</sup> over forty percent of federal student loan borrowers replied "that they had not received loan counseling."<sup>211</sup> The inefficacy of the counseling process is acutely problematic given that if the process were more effective and informative, it could help to ensure continued access to higher education and curb excessive student loan debts.<sup>212</sup>

Therefore, given the importance of maintaining access to higher education and the current deficiencies of the law governing the acquisition of federal student loans, a significant and serious legislative effort is needed to enhance the counseling requirements attached to the federal

---

<sup>207</sup> *Id.* at 2080 ("[T]he standard online test offered by the U.S. Department of Education is extraordinarily easy, containing simple true/false and multiple-choice questions that largely restate the informative text presented to the borrower.").

<sup>208</sup> *See id.* at 2079 (using student loan counseling quizzes as an ineffective example of the "train-and-test model," in a taxonomy of contract theory models that minimize harm to a contracting party, given his or her ease of completion).

<sup>209</sup> *See* Loonin, *supra* note 31, at 9 (discussing the ineffectiveness of the existing counseling requirements for federal student loans).

<sup>210</sup> *See* Healey C. Whitsett & Rory O'Sullivan, *Lost Without a Map: A Survey About Students' Experiences Navigating the Financial Aid Process*, NERA ECON. CONSULTING 4 (Oct. 11, 2012), [http://www.nera.com/nera-files/PUB\\_Student\\_Loan\\_Borrowers\\_1012.pdf](http://www.nera.com/nera-files/PUB_Student_Loan_Borrowers_1012.pdf) (providing information about the nature of the study).

<sup>211</sup> *See id.* at 15 ("Despite the fact that the federal government mandates entrance and exit counseling, over 40 percent of respondents with federal loans told us that they had not received loan counseling . . . . There are several explanations for this statistic. First, colleges may not be adequately complying with the legal requirement to provide counseling. Second, lax standards may allow schools to offer poor quality programs, which students do not recognize as counseling. Third, borrowers may not remember that they received counseling resulting from poor quality or students simply forgetting. It will require further research to fully understand this feedback, though the responses strongly suggest the loan counseling system is not working for students.").

<sup>212</sup> *See id.* at 16–17 (discussing how many student loan borrowers wished that the student loan counseling process had been more informative for their specific situations and how that could have resulted in lower loan amounts).

student loan process.<sup>213</sup> Specifically, 20 U.S.C. § 1092—the current statute governing the distribution of institutional and financial assistance information to student borrowers—and its coordinating administrative regulation on counseling borrowers should be amended in order to accomplish the twin goals of providing informed access to higher education and helping to reduce student loan debt burdens.<sup>214</sup> These proposed amendments involve: (1) the nature of delivery of the entrance and exit counseling; (2) the addition of interim counseling; and (3) a prohibition on the charging of any fee associated with these enhancements. Although relatively modest in scope,<sup>215</sup> these changes to the current legal provisions regarding student loan counseling would provide vital knowledge to student loan borrowers—a stated goal of the federal government<sup>216</sup> and the core mission of public and private nonprofit institutions of higher education.<sup>217</sup>

The first necessary amendments to the statutory and regulatory framework of the student loan counseling process would require institutions to provide only *in-person* entrance and exit counseling to students.<sup>218</sup> Within these in-person entrance and exit counseling sessions, the dissemination of specific, personalized information regarding a student's debt and repayment obligations should be mandated, instead of just allowing information to be provided that is based on the averages of other students in the same program or at the same school.<sup>219</sup> The second form of necessary amendments to the statutory and regulatory framework

---

<sup>213</sup> See, e.g., Glater, *supra* note 4, at 72 (providing a general discussion about how “legislative and regulatory responses” to certain issues regarding student loans “have not gone far enough in facilitating access to higher education”).

<sup>214</sup> 20 U.S.C. § 1092 (2012); Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (2013).

<sup>215</sup> This portion of the normative section of the Article is intentionally brief and narrow to reinforce the relative ease with which these statutory and regulatory amendments could be effectuated.

<sup>216</sup> See *Education: Knowledge and Skills for the Jobs of the Future*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education> (last visited Sept. 15, 2013) (“In the vein of transparency and accountability, the President tasked his Administration with giving students and families new tools and relevant information that will help them make sound financial decisions in pursuing their higher education goals.”).

<sup>217</sup> See Tim Hatcher, *Shanghaiing America's Best Thinking: Musings on University Corporatization, Chinese Partnerships, and Embracing Critical Theory*, 39 MCGEORGE L. REV. 763, 764 (2008) (“Today’s public university evolved from merging of the ideals of private land grants, European universities, and colonial colleges whose mission was to educate the population for life in a democratic society.”); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 964 (2001) (“[Race-sensitive admissions] is premised on a widely shared belief that the primary mission of colleges and universities is to educate those students who are likely to become the leaders of society in an increasingly diverse world.”).

<sup>218</sup> This requirement would be live, in-person counseling for traditional brick and mortar schools and synchronous, in-person counseling for those students who attend only online programs at traditional colleges and universities or students who attend entirely online institutions of higher education.

<sup>219</sup> See *supra* note 194 and accompanying text.

of the student loan counseling process would involve the addition of a requirement that institutions provide in-person, personalized interim counseling to student loan borrowers prior to each disbursement of student aid.<sup>220</sup> Finally, in order to block institutions from attempting to increase costs when implementing these enhanced student loan counseling processes that are designed to ease student loan debt burdens, a statutory change to the program participation agreement statute would be necessary, which would bar the assessment of any fee or charge to students for student loan counseling.<sup>221</sup>

By requiring institutions to have in-person entrance and exit loan counseling that students must attend as a condition of obtaining student loan monies, as well as interim, personalized counseling prior to each disbursement, the beneficiaries of taxpayer-supported federal student loan money would have more “skin in the game.”<sup>222</sup> This would result in more transparency for the institution, more financial literacy for the student,<sup>223</sup> and greater societal benefits.<sup>224</sup> In effect, it would provide a significant improvement to the status quo of the student loan counseling that is currently required. The current allowances for non-synchronous, online, non-personalized student loan counseling do not sufficiently present the importance of the obligations that accompany the acquisition and repayment of student debt.<sup>225</sup> Quite simply, the statutory encouragement to facilitate the counseling process through interactive electronic means is self-defeating given how paltry the current interactive aspects measure the borrower’s understanding of the substantial amount of complicated information that is conveyed.<sup>226</sup>

Conversely, the enhancement of the statutory and regulatory

---

<sup>220</sup> Currently, there are no statutory or regulatory provisions for interim student loan counseling. See *supra* note 191.

<sup>221</sup> This could be accomplished through an addition to the statutory prohibition on institutions charging students fees “for processing or handling any application, form, or data required to determine the student’s eligibility for [financial] assistance.” 20 U.S.C. § 1094(a)(2) (2012).

<sup>222</sup> See Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 NOTRE DAME L. REV. 1349, 1385–86 (2011) (characterizing “skin in the game” as “sharing at least some portion of the risk of loss associated with their actions”).

<sup>223</sup> See Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205, 208 (2011) (arguing that increased financial literacy counseling can help to overcome social capital deficits).

<sup>224</sup> See Toben & Osolinik, *supra* note 145, at 164 (discussing how the benefits of post-secondary education to society are equally significant to these benefits for the individual students).

<sup>225</sup> See *supra* text accompanying notes 199–208.

<sup>226</sup> See 20 U.S.C. § 1092(f)(1)(B) (“The Secretary shall encourage institutions to carry out the requirements of subparagraph (A) through the use of interactive programs that test the borrower’s understanding of the terms and conditions of the borrower’s loans under part B or C of this subchapter, using simple and understandable language and clear formatting.”); *supra* notes 187 and 189 (detailing the extensive amount of information that is required to be conveyed during entrance and exit counseling).

framework in these ways would provide several distinct measures of informed access, thereby educating students that the option of taking the full amount of available student loan monies might not be the wisest investment for their futures. Further, this proposal would result in increased accountability on the part of all of the stakeholders in the process. It would require an actual commitment to addressing the problem of student debt burdens by the federal government.<sup>227</sup> It would require that institutions, which garner a significant amount of their revenue from tuition and fees that are subsidized primarily by federal student loans,<sup>228</sup> provide increased education for their student borrowers about the legal responsibilities attached to the acquisition of student loan monies. Finally, it would require students to take a more active role in the student loan process, thereby reinforcing the personal accountability aspect of agreement to this type of financial lending.<sup>229</sup>

Overall, these changes would provide informed access to the vast majority of students who require federal student loan funds to attend colleges or universities. The current lack of understanding of the gravity of the obligations tied to the acquisition of student loans, and the problems that have resulted due to increasing debt loads, must be considered the newest battleground in terms of access.<sup>230</sup> The proposed federal statutory and regulatory changes in this section constitute relatively modest, but significant, measures to aid in the de-escalation and amelioration of this current climate of crisis.<sup>231</sup>

---

<sup>227</sup> See, e.g., *Education: Knowledge and Skills for the Jobs of the Future*, *supra* note 216 (outlining the Obama Administration's intentions to provide increased transparency to students in higher education).

<sup>228</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 107, at 9, 13 (finding that colleges' and universities' revenues from tuition and fees increased significantly from 1999 to 2009, and that "[r]evenues from all federal loans increased at both public and private nonprofit schools, by 134 and 138 percent respectively"); Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES, July 30, 2012, at A12 (providing that federal student loan monies compose the "bulk of the for-profit colleges' revenue, more than 80 percent in most cases").

<sup>229</sup> Personal financial accountability underlies much of legal and political theory regarding the acquisition of debt and whether or not that debt can be dischargeable in bankruptcy. See, e.g., H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 (providing that the "proposed reforms" that ultimately were included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 "respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system").

<sup>230</sup> DESROCHERS & WELLMAN, *supra* note 94, at 20 ("If institutions do not have the basic capacity to offer courses or provide necessary services, maintaining access without resources proves to be a false promise.").

<sup>231</sup> See, e.g., Jon Marcus, *Why is College Enrollment Dropping?*, TIME (May 31, 2012), <http://www.time.com/time/nation/article/0,8599,2116059,00.html> (discussing the "ominous signs that overall college enrollment is starting to drop" due to high costs and increasing debt obligations).

## V. CONCLUSION

Despite significant advances in access to higher education, this progress is now being threatened.<sup>232</sup> The status quo of increased costs and growing student debt is not a sustainable model for American higher education.<sup>233</sup> The stagnation (and decline) of wage growth over the last thirty years,<sup>234</sup> coupled with the higher rate of unemployment following the Great Recession,<sup>235</sup> has only exacerbated these problems. However, maintaining, if not increasing, higher educational attainment is key to both the individual successes of citizens<sup>236</sup> and the economic growth of the country.<sup>237</sup> Consequently, it has become imperative to find innovative measures to attempt to avoid the eventuality of a student loan-induced

<sup>232</sup> See *supra* text accompanying notes 21–24 (presenting heightened levels of student debt as a future impediment to accessing higher education).

<sup>233</sup> See Goldie Blumenstyk, *One-Third of Colleges Are on Financially “Unsustainable” Path, Bain Study Finds*, CHRON. HIGHER EDUC. (July 23, 2012), <http://chronicle.com/article/One-Third-of-Colleges-Are-on/133095/> (“[O]ne-third of the [1,700 public and private nonprofit institutions of higher education analyzed by Bain from 2005 to 2010] have been on an ‘unsustainable financial path’ in recent years, and an additional 28 percent are ‘at risk of slipping into an unsustainable condition.’”); Elizabeth Dexheimer, *Overdue Student Loans Reach ‘Unsustainable’ 15%, Fair Isaac Says*, BLOOMBERG (Jan. 29, 2013), <http://www.bloomberg.com/news/2013-01-29/overdue-student-loans-reach-unsustainable-15-fair-isaac-says.html> (quoting the chief analytics officer of Fair Isaac as stating “[w]hen wage growth is slow and jobs are not as plentiful as they once were, it is impossible for individuals to continue taking out ever-larger student loans without greatly increasing the risk of default”).

<sup>234</sup> See Timothy M. Kaine, *Economic Policy After a Lost Decade—From Over-Spending to Innovation*, 45 U. RICH. L. REV. 1037, 1045 (2011) (“[M]uch of the reduction in traditional household savings rates was clearly driven by years of stagnant wages for middle-class families who faced rising costs for significant expenditures such as housing, health care, and education.”); Lawrence Mishel & Heidi Shierholz, *The Sad but True Story of Wages in America*, ECON. POL’Y INST. (Mar. 15, 2011), [http://www.epi.org/publication/the\\_sad\\_but\\_true\\_story\\_of\\_wages\\_in\\_america/](http://www.epi.org/publication/the_sad_but_true_story_of_wages_in_america/) (“Recent debates about whether public- or private-sector workers earn more have obscured a larger truth: all workers have suffered from decades of stagnating wages despite large gains in productivity.”).

<sup>235</sup> See MICHAEL REICH, CTR. ON WAGE & EMP’T DYNAMICS, HIGH UNEMPLOYMENT AFTER THE GREAT RECESSION: WHY? WHAT CAN WE DO? 1–3 (2010), *available at* <http://www.irle.berkeley.edu/cwed/wp/2010-01.pdf> (discussing the high rates of long-term and very-long-term unemployment after the Great Recession).

<sup>236</sup> See Anthony P. Carnevale et al., *The College Advantage: Weathering the Economic Storm*, GEO. PUB. POL’Y INST. 35 (Aug. 15, 2012), <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/CollegeAdvantage.FullReport.081512.pdf> (“At a time when college education is under attack from budget cuts and the increasing cost of college education is raising the question of whether postsecondary education is worth the money, these findings provide a compelling reason to say, yes. In jobs at every skill level and in many different occupations, the better-educated applicant has the edge.”).

<sup>237</sup> See Michael Greenstone & Adam Looney, *The Uncomfortable Truth About American Wages*, ECONOMIX (Oct. 22, 2012, 1:00 PM), <http://economix.blogs.nytimes.com/2012/10/22/the-uncomfortable-truth-about-american-wages/> (“Among the most robust findings in economics is that education reduces unemployment and increases earnings. But even with the remarkable capacity for education to produce growth, the rate of educational attainment in the United States has slowed . . . . Strengthening our K–12 education system and increasing college-completion rates are, therefore, imperative to improving living standards for future generations.”).

financial crisis.<sup>238</sup>

The statutory and regulatory amendments proposed in this Article offer a moderate addition to the existing law that governs the provision of information to students as part of the student loan process. These changes are fully within the congressional scope of authority,<sup>239</sup> and they could be easily achieved through the next reauthorization of the Higher Education Act.<sup>240</sup> They would not provide external constraints on access to higher education, and they would only require institutions to comply with their missions: to educate students about their current and future lives.<sup>241</sup> In sum, these proposed amendments are both attainable and beneficial to all of the stakeholders in the student loan process.

Admittedly, there might be resistance to the implementation of these statutory and regulatory proposals by some factions of these stakeholders. Students may not want an extra time burden attached to the acquisition of federal student loans.<sup>242</sup> Some institutions of higher education might claim that they do not have the resources to conduct the training.<sup>243</sup> Some

---

<sup>238</sup> See Halahtouryalai, *More Evidence on the Student Debt Crisis: Average Grad's Loan Jumps to \$27,000*, FORBES (Jan. 29, 2013), <http://www.forbes.com/sites/halahtouryalai/2013/01/29/more-evidence-on-the-student-debt-crisis-average-grads-loan-jumps-to-27000/> ("Predicting the next financial crisis isn't easy but there's growing evidence that student loans will be involved in the next one.").

<sup>239</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Incident to this [spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980))).

<sup>240</sup> The Higher Education Act is slated for reauthorization in 2013, per the five-year reauthorization schedule. See, e.g., Sara Lipka, *Quest for Good Graduation Data Will Be Key to Next Higher Education Act*, CHRON. HIGHER EDUC. (Nov. 15, 2012), <http://www.chronicle.com/article/Quest-for-Good-Graduation-Data/135816/> (discussing congressional preparation for the next reauthorization of the Higher Education Act in 2013). But see *Higher Education Accreditation*, NEW AM. FOUND., [http://pnpi.newamerica.net/spotlight/higher\\_education\\_accreditation](http://pnpi.newamerica.net/spotlight/higher_education_accreditation) (last visited Sept. 15, 2013) ("Any changes to federal law and accreditation are most likely to be made during the next reauthorization of the Higher Education Act. Although that Act is scheduled to be reauthorized in 2013, almost all federal education statutes are now many years behind schedule for reauthorization.").

<sup>241</sup> See Steven Bahls, *Time to Teach Financial Literacy*, INSIDE HIGHER ED (June 13, 2011), [http://www.insidehighered.com/views/2011/06/13/essay\\_on\\_responsibility\\_of\\_colleges\\_to\\_teach\\_financial\\_literacy](http://www.insidehighered.com/views/2011/06/13/essay_on_responsibility_of_colleges_to_teach_financial_literacy) ("All liberal arts colleges—but especially those colleges enrolling classes with more first-generation college students than ever before—have an obligation to ask how we can continue to improve the experience of gaining financial literacy and those outcomes for our students.").

<sup>242</sup> See, e.g., Davis, *supra* note 203 ("Personally, I just wanted everything to be over with for my financial aid so I breezed through the [online entrance counseling] quiz because I knew my financial aid office really just cared about the MPN."). But see Whitsett & O'Sullivan, *supra* note 210, at 16 (discussing how a portion of student loan borrower respondents in their study "said they would prefer in-person counseling over online counseling").

<sup>243</sup> See, e.g., Jennifer Epstein, *Resistance on Debt Proposal*, INSIDE HIGHER ED (Jan. 26, 2010), <http://www.insidehighered.com/news/2010/01/26/employment> (discussing the massive resistance by all sectors of higher education to the Department of Education's proposed gainful employment regulations). But see *Financial Aid Money Awareness Program*, SYRACUSE U.,

legislators who desire smaller government may resist any attempt to increase the federal regulation of higher education.<sup>244</sup> However, given that students, colleges, and universities are the beneficiaries of the allocation of these Title IV student loan funds,<sup>245</sup> and that the federal government is the steward of those funds, this resistance should not impede the necessary legal changes advocated for in this Article. Indeed, historically, the federal legislature has mandated that institutions of higher education move forward to increase access even when institutions and individual students have resisted this progress.<sup>246</sup> In this case, the statutory foundation for this federal mandate already exists;<sup>247</sup> these student loan counseling requirements just need to be made pedagogically effective to provide that informed access.

---

[http://www.syr.edu/financialaid/financialliteracy/money\\_awareness\\_program.html](http://www.syr.edu/financialaid/financialliteracy/money_awareness_program.html) (last visited Sept. 15, 2013) (discussing the Money Awareness Program, a program initiated by Syracuse University that attempts to identify students who may be acquiring too much debt and to assist them in finding ways to reduce those debt burdens).

<sup>244</sup> For example, Senator Daniel Akaka and Representative Sheila Jackson Lee each introduced bills in the 112th Congress, entitled the College LIFE Act, as legislative efforts to require broader financial literacy training that could impact the loan counseling process. See College LIFE Act, S. 1260, 112th Cong. (2011); College LIFE Act, H.R. 2535, 112th Cong. (2011). However, neither bill made it out of committee. See *S. 1260 (112th): College LIFE Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1260> (last visited Sept. 15, 2013) (listing the bill's status as "died (Referred to Committee)"); *H.R. 2535 (112th): College LIFE Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2535> (last visited Sept. 15, 2013) (same). Still, there is continued interest by some legislators in reforming the student loan counseling process. For example, Senator Dick Durbin has expressed interest in colleges that have taken the initiative to provide more than the basic loan counseling required by the statute. See Kate Thayer, *Durbin Touts ECC's Required Loan Counseling Program*, CHI. TRIB. (Jan. 14, 2013), [http://articles.chicagotribune.com/2013-01-14/news/ct-tl-elgin-ecc-durbin-loans-20130114\\_1\\_private-loans-student-loans-student-debt](http://articles.chicagotribune.com/2013-01-14/news/ct-tl-elgin-ecc-durbin-loans-20130114_1_private-loans-student-loans-student-debt) ("She recalled one student who at first thought \$18,000 in loans would be needed to take classes at ECC, but after working on a budget with a counselor 'he left the office with \$800' in loans.").

<sup>245</sup> The possible recalcitrance of institutions of higher education to these changes could also be overcome by self-interest. By offering these enhanced student loan counseling sessions, the institutions would further insulate themselves against possible claims for fraud, breach of contract, or malpractice from students claiming they had too little information about their programs and costs. See, e.g., Sonia Gioseffi, Note, *Corporate Accountability: Achieving Internal Self-Governance Through Sustainability Reports*, 13 CORNELL J.L. & PUB. POL'Y 503, 504 (2004) ("To operate efficiently, to maintain a positive public image, and to avoid civil and criminal liability, companies need to understand and respond to pressure for greater transparency.").

<sup>246</sup> See *supra* text accompanying notes 58–62.

<sup>247</sup> See 20 U.S.C. § 1092 (2012) (detailing the various information dissemination requirements and activities that institutions of higher learning must comply with for both enrolled and prospective students).